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THE
WILL WHICH THE LAW MAKES:

OR,

How it DISPOSES of a PERSON'S ESTATE, in case
he dies without WILL or TESTAMENT.

SHEWING

In a plain, easy, and comprehensive Manner, how
a Man's Family or Relations will be intituled to
his REAL and PERSONAL ESTATE, and
how the same is subject to the DISCHARGE of his
DEBTS:

LIKEWISE

How the Debts are to be paid by the Administrator, and
to whom the Surplus of the PERSONAL ESTATE is to be
distributed, pursuant to the Stat. 22 & 23 Car. II. the
1 Jac. II. and the Customs of the City of LONDON and
Province of YORK.

By PETER LOVELASS, of the INNER TEMPLE, Gent.

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T H B

P R E F A C E.

FROM the number of books which contain our system of jurisprudence, the expediency of digesting the laws under important heads is indisputably clear; and by the applications that are continually making to persons conversant in the law, concerning the title to real and personal estate in cases of intestacy, the Author of this Work was convinced, that no selection could be made from the venerable pile of law learning more generally useful, than that which relates to the estates of persons dying intestate; especially when rendered perfectly intelligible to every class of readers: with this view he has endeavoured, in the following sheets, to avoid ambiguity, and when the Latin words and technical terms of the law have occurred, has added the English to the one, and explained the meaning of the other.

THE expediency of this work must be conspicuous, if we reflect on the numerous instances of persons dying intestate, and leaving the whole
of

P R E F A C E.

of their estates and fortunes to the disposition of the law; and that thereby some on a sudden have been intitled to real or personal estate of considerable value, whereof not a few have been deprived, if not totally defrauded, through ignorance of the law: and in respect to personal estate, this has too often happened from not knowing who were intitled to the administration, before the deceased's effects were gotten into the hands of ill-disposed persons.

FROM the ensuing Contents the Reader may perceive the principal matters here treated on, and by the Alphabetical Index at the end of the book may refer with ease to any particular point.

C O N T E N T S

A N D

TABLE OF THE PRINCIPAL MATTERS.

CHAP. I.

Of Intestates. Of Administration; why it should be obtained, and who are intitled thereto. By whom it is to be granted. The Method of obtaining it, and the Expence thereof. How the same may be revoked.

SECT. I. *Of Intestates,* - - Page 1

Description of intestates, shewing the kind of intestacy here intended, - - - ib.

The effect of a testament where no executor is named, 2

SECT. II. *Of Administration: why it should be obtained, and who are intitled thereto,* - - - ib.

Reason why administration should be obtained, - - - ib.

Husband intitled to the administration of his wife's goods, but not of those she has as executrix, - - - 3

Why it may be necessary for the husband to obtain administration to his wife's goods, - - - ib.

Ordinary compellable to grant administration, - - - ib.

To whom administration of an husband's goods may be granted, - - - ib.

Ordinary's power of granting administration, - - - 4

Who among the intestate's kindred are to have the administration, - - - - - ib.

Half blood equally intitled to the administration with the whole blood, - - - - - 5

Admini-

Administration, not to be granted to an infant,	Page 3
Ordinary's power of granting it when the same de-	
volves upon an infant,	ib.
To whom administration may be granted, when none of	
the intestate's kindred will take it,	ib.
Effect of the administration when granted to one admini-	
strator, and he dies,	6
The effect thereof when granted to two, and one of them	
dies,	ib.
SECT. III. <i>Where and by whom Administration is to be</i>	
<i>granted,</i>	ib.
Where to be granted if the deceased leaves goods but in	
one bishop's diocese, and where if he leaves goods to	
the value of 5l. in two bishops dioceses,	ib.
How debts due to the intestate by specialty and simple con-	
tract, are to be reckoned in respect of the five pounds,	ib.
By whom administration is to be granted, when the de-	
ceased leaves goods both in London and Dublin, and	
in case a bond made in Ireland is in England at the	
intestate's death,	7
By whom administration is to be granted when the de-	
ceased leaves goods both in the province of Canterbury	
and York,	ib.
Of peculiar ecclesiastical jurisdictions in respect to grant-	
ing administration,	8
To whom it pertaineth to grant administration of the goods	
of a bishop,	ib.
By whom administration is to be granted when goods	
are in the diocese of an archbishop and a peculiar; and	
by whom to be granted if there are goods in several pe-	
culiaris in the same diocese,	ib.
Wages due for work done in his Majesty's yards or docks	
not subject to the prerogative jurisdiction,	ib.
Reason why the granting administration should belong to	
the prerogative court,	9
Administration voidable when granted by an improper court,	ib.
Appointed by canon 92, that persons exercising ecclesi-	
astical jurisdiction shall charge with an oath those called	
or voluntarily appearing before them, whether the de-	
ceased left goods, &c. in any other diocese; and if they	
affirm that he did, ordinary shall dismiss them to the	
prerogative,	10
That ordinary shall not require of persons dismissed any	

CONTENTS.

vii

other charges than are due for the citation and other process, and shall declare the cause belongeth to the prerogative,	- - -	Page 11
That ecclesiastical persons offending herein shall be suspended until they restore all expences, and administration granted by them shall be void,	- - -	ib.
That the register of the inferior court once a month shall inform the apparitor of the prerogative, what persons have been dismissed to the prerogative,	- - -	ib.
That this canon shall not be prejudicial to any composition between the archbishop and any bishop, &c. who shall grant administration to the party voluntarily desiring it,	- - -	ib.
That if a person die on a journey, the goods that he hath about him shall not cause administration to be taken in the prerogative,	- - -	12
Decreed by canon 93, that no judge of the prerogative shall officially cite any person, unless he hath knowledge of a deceased having goods to the value of 5 <i>l</i> . in some other diocese or peculiar,	- - -	ib.
That if the judge of the prerogative court cite any person contrary to this canon, he shall restore cost to the injured party, and the proceedings shall be void; and if he refuse to restore cost, shall be suspended till he doth restore it,	- - -	ib.

SECT. IV. *What the Person applying for Administration is to do before it is granted,*

Must make oath. The usual form thereof,	- - -	13
Must become bound to the ordinary with two sureties,	- - -	14
Form of the bond,	- - -	ib.
The effect thereof,	- - -	15

SECT. V. *The Fees and Expence of obtaining the Administration,*

What the expence of obtaining administration has been since the year 1734, when the fees were settled by a jury,	- - -	ib.
Expence of obtaining administration since the statutes of 19 & 23 Geo. III.	- - -	17
	a	How

How the expence of obtaining adminiftration may be afcertained, and how it may be uncertain, - Page 17

SECT. VI. *How, and for what Reason the Adminiftration may be revoked,* - - - 18

Adminiftration may be revoked when a will is produced, and when granted to the next of kin before an husband, ib.

Ordinary cannot repeal adminiftration without juft caufe, of which the temporal courts are to judge, - ib.

In what cafes adminiftration may be repealed, - 19

Adminiftration revoked, fecond adminiftrator may have his action at law againft the firft, - - 20

CHAP. II.

Of the Adminiftrator.

SECT. I. *His Power by Virtue of the Adminiftration,* ib.

Adminiftrator's intereft in deceased's goods, - 21

Where he may have the fame actions as the deceased might have had, and in what cafes the action dies with the deceased, and in what cafes it does not, - 22

Where actions may be brought by adminiftrators for debts, goods, or rent of the deceased, - 23

Adminiftrators may diftrain for rent, - - - ib.

May bring actions or diftrain for rent-service, rent-charge, rent-feeck, and fee-farm, - - - ib.

Description of thofe rents, - - - 24

If a man fhall have in right of his wife any eftate in fee-simple, fee-tail, or for term of life, in any rents or fee-farms; he, his executors and adminiftrators may bring an action, or diftrain for fame after his wife's death, if unpaid, - - - 25

If any perfon fhall have any rents of fee-farms for the life of another, his executors and adminiftrators may bring an action, or diftrain for the fame after the other's death, if unpaid, - - - ib.

A Perfon that hath only an eftate for life in lands or tenements demifed, and happen to die on the quarter-day, or before the rent be due; his executors or adminiftrators may have an action to recover fame, 26

CONTENTS.

ix

No distribution to be made till after one year from the intestate's death, - - -	Page 27
Administrators may retain debts due to themselves, -	ib.
Cannot retain to the prejudice of each other, -	28

SECT. II. *The Particulars of what the Administrator is interested in, by virtue of his Administration,* - ib.

Description of chattels and freehold estates, -	ib.
Of chattels real and personal, - -	29
Of beast and animals that are not chattels, but go to the heir, and of those that are chattels, and go to the admin- istrator, - - -	ib.
Administrator interested in all leases for years, &c. -	ib.
In corn sown, roots planted, and other annual artificial profit; but not in fruit-trees and the like, -	30
In corn sown by the husband of a wife who has a lease for years as executrix, - - -	31
In things affixed, and that may be taken away without prejudice to the fabric of an house, - -	32
In a fire-engine set up for the benefit of a colliery, -	33
Goods and chattels in nature of heir-looms go to the heir,	34, 35
Some chattels go to the wife as her <i>paraphernalia</i> , -	36

SECT. III. *Of making an Inventory,* - 37

Ordinary may remit the making thereof, -	38
By whom the inventory is to be made, and the effect thereof, - - -	ib.
In case of a contest, inventory may be demanded before administration granted; and the judge may issue a commission for the valuation of the goods; and a mo- tion against any with whom the goods may be, that they shew the same, - - -	39
When the commission is executed, the inventory to be brought in signed by the appraisers, - -	40
Inventory may be required upon the oath of the admini- strator of goods disposed of, - - -	ib.
Inventory exhibited, a creditor may not object thereto in the ecclesiastical court, - - -	ib.
What is to be put into the inventory, -	41
Stamps on which the inventory is required to be written, -	ib.
Form of the inventory, - - -	42

SECT. IV. <i>Of getting in the Effects, and what shall be Affets in the Administrator's Hands to make him chargeable,</i>	Page 43
Administrator may enter deceased's house and take goods.	
May bring actions as executor,	ib.
May have an action upon a judgment, covenant, contract, &c.	ib.
New administrator may sue <i>scire facias</i> , upon judgment obtained by former administrator,	44
In what cases cost in suits shall be paid by administrators,	ib.
Affets described,	45
All the deceased's goods that come to the administrator's hands affets,	ib.
Affets in the hands of one, affets in the hands of all.	
Affets in any part of the world affets in every part,	ib.
A plantation, a chattel to pay debts,	46
All goods of a saleable nature affets,	ib.
Goods pledged affets,	ib.
Goods and chattels in action, affets when gotten into possession. Debts on bonds or otherwise, not affets till recovered,	ib.
Debts for which judgment is obtained, not affets till recovered by execution,	ib.
If judgment be erroneous and execution avoidable, thing recovered not affets,	47
If one covenant to make a lease to the deceased, his executors or administrators, and after his decease the lease is made to them, same is affets; so if executor renew,	ib.
What administrator sue for as administrator, when recovered shall be affets, whether the suit be at law or in equity,	ib.
Thing gone from the administrator may be affets; as where the administrator may have a lease for years of the deceased's, and afterwards purchase the fee, or having a term surrender it to him in reversion,	ib.
Where debtee makes his debtor executor, the debt will be affets as to creditors,	ib.
Goods in possession of the deceased, and not his own, not affets; so if he was outlawed his goods are not affets,	48
Release of a debt makes it affets,	ib.
Lease for years of an annual rent, affets for so much as the term is worth when the rent is deducted,	ib.
In	

CONTENTS.

xi

In what cases an estate <i>per auter vie</i> is distributable.	
The same assets in the hands of the heir if he has it as special occupant,	Page 49
Mortgage for years assets at law, but mortgage in fee assets in equity,	ib.
To whom money due on mortgage is to be paid,	ib.
Servant free on the death of master,	ib.
Interest in an apprentice a chattel personal, and goes to the executor; so the interest in a prisoner for debt,	50
Acts done by an administrator good though the administration be afterwards repealed. Difference when repealed by citation or by appeal,	ib.
Creditor may have relief against an administrator in case of fraud,	ib.
Where administration is obtained for defrauding creditors, administrator may be charged as executor of his own wrong,	ib.
What an executor of his own wrong is, and the effect thereof,	51

SECT. V. *The Administrator's Office and Duty in paying Debts,*

Debts to be paid according to the rules of priority,	ib.
Funeral charges, &c.	ib.
Debts due to the King,	ib.
Debts preferred by particular statutes,	52
Debts of record, as judgments, &c.	ib.
Judgment had against administrator, and though without defence, same as if had against the deceased,	53
Where two judgments, the first that sues execution to be preferred,	ib.
Before execution sued administrator may pay which creditor he pleases,	ib.
Judgments not limited to the courts at Westminster,	ib.
Judgments not docketted, not to be preferred in payment,	ib.
Where judgments obtained in any of the courts at Westminster may be found,	ib.
Decree in equity equal to a judgment at law,	54
Administrator may give precedence to which he will in payment of debts due on statutes and recognizances; but those forfeited are to be preferred,	ib.

Time of antiquity between one statute and another gives no advantage as to goods, but he who first seizeth them by execution is preferred,	- - -	Page 54
Mortgages to be reckoned amongst debts of record,	- - -	ib.
Mortgages, statutes, and recognizances, to be paid according to their priority,	- - -	55
Debts by specialty,	- - -	ib.
Rent arrear, a debt by specialty, against which the administrator cannot wage his law. What it is to wage law,	- - -	ib.
Bond good against administrators, though not named; otherwise in respect of the heir,	- - -	56
Debts of record to be taken notice of at executor's peril; but executor must have notice of debts due by specialty,	- - -	ib.
Where divers obligations of the like kind, executor may discharge which he will first; unless the day of payment in one is expired, and in the other is not yet come; or unless suit be commenced,	- - -	ib.
Executor may confess judgment; and where several actions brought, the first judgment obtained to be first satisfied,	- - -	57
Interest, what debts carry interest,	- - -	ib.
Simple contract debts described,	- - -	ib.
One simple contract creditor may be paid his whole debt if no suit commenced, and though nothing be left for the rest,	- - -	58
Administrator hath no legal notice of a debt unless suit be commenced,	- - -	ib.
Promise made by administrator not binding unless by writing,	- - -	ib.
Apprentice to be provided for,	- - -	ib.
Assets both legal and equitable; what they are, and how to be applied in paying debts,	- - -	59
Administrator sued for a simple contract debt while a debt on specialty remains unpaid; must not pay the simple contract debt, nor suffer the plaintiff to recover,	- - -	ib.
If sued on bond or specialty while debts on record remain unpaid; must not suffer plaintiff to recover,	- - -	60
If executor plead fully administered, and any assets found to be in his hands, plaintiff shall have judgment for his whole debt,	- - -	ib.
Safe way for administrator where desirous of being rid of the assets, to file a bill against the creditors,	- - -	ib.

CONTENTS.

xiii

SECT. VI. *Of accounting before the Ordinary,* Page 61

- Ordinary may call administrator to account, but not otherwise than by an inventory; unless at the instance of some person having a demand out of the deceased's estate, - - - - - ib.
- Administrator called to give an account by a person having interest, is bound to exhibit an inventory and account upon oath if demanded, - - - - - ib.
- Administrator called to account before the ordinary, may cite the next of kin and others having interest in the deceased's goods; and upon their appearing or contempt the judge will proceed to give sentence, 62
- Administrator to be allowed all reasonable expences, ib.
- Administrator not being cited to account, ordinary must take his account as given in, and not oblige him to prove the items, or swear to the truth of them, - ib.
- Administrator's account not examinable by the ordinary, unless a party controverts it, - - - 63
- A bill for distribution properly lies in chancery, - ib.
- Ordinary no jurisdiction where the surplus of personal estate, for want of distribution by a will, is distributable, ib.
- Ordinary cannot compel an intestate's money to be brought into the spiritual court for distribution to be made, - - - - - ib.

CHAP. III.

Of Distribution.

- SECT. I. *What the Administrator is to observe before he makes Distribution,* - - - - - 64
- The time when distribution is to be made, and the security that may be required, - - - - - ib.
- Receipts to be given pursuant to the statute of 19 Geo. III. ib.
- To be given pursuant to the statute of 23 Geo. III. 65
- To be given by the wife, children, or grandchildren, of the deceased, - - - - - 66

SECT. II. *Of making Distribution,* - Page 66

How to be made amongst the intestate's wife and children,	ib.
Children that have been advanced equal to the others shares not to have any share in the distribution; but if not advanced to their full proportion, to have as much as will make them equal,	67
Heir at law to have an equal share with the other children, notwithstanding any land he may have had,	ib.
If heir at law have had any advancement otherwise than by land, must abate for the same,	ib.
If co-heiresses have had any advancement besides lands, they must bring the same into hotchpot,	ib.
The word hotchpot explained,	ib.
Heir to borough-english lands not to abate in respect thereof,	68
What may be given to or bestowed on a child, yet no part of his advancement within the meaning of the act,	ib.
What shall be deemed an advancement of children,	69
Grandchildren to bring into hotchpot what their father was advanced,	70
Widow to have no advantage of children's advancement when brought into hotchpot,	ib.
How distribution is to be made amongst the intestate's children,	71
Child in the mother's womb equally intitled with the other children,	72
How distribution is to be made where there are only grandchildren,	ib.
How to be made where some of the intestate's children are living, and some dead having left children,	ib.
If but one descendant, the whole vests in that one,	73
Distributive share vests immediately on the intestate's death,	ib.
If no descendant, intestate's wife to have a moiety, and his next of kin the other,	ib.
Where the intestate leaves no wife, descendant, or father, his mother, brothers, and sisters, and the representatives of his brothers and sisters, have the whole,	74
If leave no brother or sister, or representative of brother or sister, his mother has the whole,	75

CONTENTS.

27

Half blood equally intitled with the whole blood, as also a posthumous child,	Page 75
How distribution is to be made between the intestate's mother, brothers, and sisters. And how between his mother and his brother's and sister's children,	76
Representation not admitted among collaterals after brothers and sisters children,	77
Kindred distinguished either by the right line or by the collateral,	ib.
How the degrees of kindred are to be reckoned,	78
Brother of intestate preferred to his grandfather,	79
Grandmother preferred to intestate's aunt,	80
How distribution is to be made where the intestate's aunt and a deceased brother's children are his next of kin,	ib.
Brief description of those who will be intitled to the intestate's estate, pursuant to the statute of Car. II. and Jac. II.	81, 82
Table of distribution,	83
How the intestate's estate is disposed of in case he dies without kindred,	84
Must be consanguinity or relationship by blood, to intitle a person to a share of an intestate's estate,	ib.
Husbands and wives of intestate's kindred intitled in right of each other,	85

CHAP. IV.

The Descent of real Estates, or Estates of Inheritance. How the Law disposes thereof to the Heir; the Husband of a deceased Wife, and the Wife of a deceased Husband.

SECT. I. *How the Law disposes of the Inheritance to the Heir,* 86

Of fee-simple, and in what manner the ancestor must be possessed of the inheritance, that his heir may have it at his death,	ib.
Law of inheritances in fee-simple the principal object of the laws of real property,	87
Rule that inheritances shall never lineally ascend. That sons shall be admitted before daughters,	ib.
	Where

Where a man hath two sons and two daughters. How the sons shall inherit; and in case of their death without issue, how the daughters shall inherit, -	Page 88
Eldest son and his issue to succeed before the younger, -	ib.
Where a man hath issue two daughters, and one dies leaving daughters, and then the father of the sisters dies. How the surviving sister and her nieces shall inherit, -	ib.
Where the next heirs may be six nieces, three by one sister, two by another, and one by a third. How the inheritance shall be distributed, - -	ib.
Where a man hath only three daughters, all of whom have died; one leaving sons; another daughters; and the third a daughter and a son. How the inheritance shall be distributed on the death of the grandfather, -	89
On failure of issue of the person last seized, the inheritance to descend to the blood of the first purchaser, -	ib.
How the inheritance is to descend to the blood of the first purchaser; who those are, and how to be traced, -	90
Whole blood excludes the half blood. Description of the half blood, - - -	91
In collateral inheritances male stocks to be preferred to female, unless the lands have descended from a female, -	92
If the line from which the lands descended is forgotten, or was never known, the male line to be first searched for finding heirs, - - -	ib.
Heir favoured by the law. Not liable to pay simple contract debts, - - -	93
If the estate is mortgaged, must be redeemed by the personal estate, if sufficient to pay the deceased's debts, -	ib.
If not sufficient personal estate to pay the deceased's debts, real estate liable to pay such as are due by bonds and specialties, - - -	ib.
Heir liable to pay his ancestors debts, though he may have sold or made over the estate before action brought, -	94
 SECT. II. <i>How the Law disposes of a Wife's real Estate: or the Law concerning a Tenancy by the Curtesy of England,</i> - - -	
Husband by having issue, intitled to hold his wife's estate for his life, as tenant by the curtesy of England, -	ib.
Wife must have actual possession, yet entry not always necessary, - - -	ib.
3	Husband

Husband may be tenant by the curtesy of some hereditaments, though wife not actually seised thereof,	Page 95
The courts of equity have allowed curtesy of trusts and other interests,	ib.
If wife be an idiot, husband cannot be tenant by the curtesy,	ib.
Issue must be born alive, and capable of inheriting, to intitle the husband to curtesy,	ib.
A monster who hath not human shape, not capable of inheriting,	ib.
The nature and effect of a tenancy by the curtesy,	96
Wife cannot dispose of her estate either by will or deed; yet husband and wife may dispose thereof,	ib.

SECT. III. *How the Law disposes of an Husband's real Estate: or the Law concerning a Tenancy in Dower,* ib.

Wife to be endowed of one-third part of all lands held by her husband in fee-simple, or fee-tail,	ib.
What is requisite to intitle the wife to dower, and what may render her incapable of being endowed,	97
Wife intitled to dower whether she hath issue or not,	ib.
Seisin in law of the husband sufficient to intitle the wife to dower,	ib.
Seisin of the husband for ever so short a time sufficient to intitle the wife to dower,	98
Certain hereditaments whereof the wife cannot be endowed,	ib.
Wife cannot be barred of dower by any act her husband can do alone, nor without a fine, &c.	ib.
Method sometimes used by an husband to save the expence of a fine when he conveys the estate,	ib.
Wife may be barred of dower by settlement made before marriage,	99
Method of conveying an estate to a man whereby his wife may not be intitled to dower,	ib.
Certain counties, cities, towns, &c. indulged with abiding by their own customs, which prevail in contradistinction to the general law of the land,	ib.
Custom of gavel kind,	ib.
Custom of borough-english. Customs of manors,	100

CHAP. V.

*The Customs of the City of London and Province of York.*SECT. I. *Wherein the Customs of London and York agree, and wherein they vary,* - - Page 101

The inhabitants of London and York, as well as other parts of the kingdom, impowered to dispose by will, of the whole of their personal estate to whom they think fit, - - - ib.

The ancient customs of London and York remain in full force in respect to the estates of intestates, - 102

London different from other parts of the nation in respect to the custody of children, - - - ib.

Executors and administrators of freemen of London to exhibit inventories before the mayor and aldermen. Not excused by being bound in the spiritual court, - ib.

Of intermarrying with an orphan of London, - 103

Principal points wherein the customs of London and York differ, - - - ib.

SECT. II. *The Customs of the City of London as to Intestacy,* - - - ib.

Freeman's widow and children intitled to his personal estate by the custom, whether he dies in London, or his estate be in London or elsewhere, - - - ib.

How the estate is to be divided between the freeman's widow and children, - - - ib.

After-born child intitled with the rest, - - - 104

How the estate is to be divided where there is a widow and no child. How where there are children and no wife. How where there is neither wife nor child, - ib.

Widow may be barred by settlement, or children by being advanced, - - - ib.

How the widow may be barred as to her customary part only, - - - 105

How she may be barred of her customary, and other part of her husband's personal estate, - - - ib.

How

CONTENTS.

xix

How the children will be intitled when the widow is barred of her claim, - - -	Page 106
The effect of children advanced in part or in whole.	
Advancement must be of personal estate, -	ib.
Real estate settled on a child no advancement, -	107
What may be given to a child, yet not be deemed an advancement, - - -	ib.
Marriage portion may be an advancement in part or in whole, - - -	108
Child of age may bar herself of any future claim from her father's personal estate, - -	109
A man of age, who marries a freeman's daughter who is under age, may bar himself of any future claim, -	ib.
Release by a man of age, who marries a freeman's daughter who is under age, may bar husband and wife, - - -	110
Children partly advanced to bring in such advancement among the other children, and the widow to have no benefit therefrom, - - -	ib.
If several children, or but one child, and such be fully advanced, widow to have half by the custom, -	111
Where the freeman leaves an only child, but no wife, the child shall have the whole, - -	112
Where he leaves no wife, but several children, one advanced in part, another fully advanced, and another not advanced: how such will be intitled, -	ib.
Representatives of deceased children intitled by the statute, - - -	ib.
How the freeman's estate shall be divided between his wife and grandchildren where he leaves no child, -	113
Infant cannot devise orphanage share, but may the share intitled to by the statute at certain age, -	ib.
SECT. III. <i>The Custom of the Province of York as to Intestacy,</i> - - - 114	
An inhabitant or householder of the Province of York dying there or elsewhere intestate, his wife and children intitled to his estate; and how as by the custom and statute, - - -	ib.
Wife allowed her wearing apparel and furniture of her bedchamber, - - -	ib.
Wife may be barred by settlement, - - -	ib.
How the estate is to be disposed of where there is a wife	and

and a child or children, which child is heir, or which children were advanced by the father,	Page 114
If the intestate leaves neither wife nor child, his personal estate to be distributed as directed by the statute of distribution,	115
Child having any real estate by descent or otherwise from his father, excluded from a customary share of his father's personal estate. So if he is heir to lands in fee-simple or fee-tail general or special, or if he is heir in reversion,	ib.
Brief description of estates tail,	ib.
Heir excluded by having lands by his father's marriage settlement,	116
Heir only excluded from what he would be intitled to by the custom, and not from what he is intitled to by the statute,	ib.
What may be bestowed on a child, yet not deemed an advancement,	117
What shall be deemed an advancement so as to exclude a child from a filial portion,	ib.
Children partly advanced may bring same into hotchpot,	118
If no wife, but an only child, same to have the whole,	ib.
If divers children, and one is heir at law, and the others advanced; heir at law by the statute to have the whole,	119
How the estate is to be distributed where there are divers children; one heir at law; another advanced; another partly advanced; and another not advanced,	ib.
Representatives of deceased children admitted by the statute, but not by the custom,	ib.
What part the wife shall have where there is no child or representative of any child,	ib.
What part she shall have where there be only representatives of a child or children,	120
How the estate is to be distributed where there is a wife and children, and one child is heir at law, and the others advanced,	ib.
How to be distributed where there is a wife and children, one of the children not being advanced,	ib.
Example of how distribution is to be made where the intestate leaves a widow and four children; the first of which being heir at law to freehold lands, and also advanced with a certain sum; the second child fully advanced; the third partly advanced; and the fourth	not

CONTENTS.

xxi

not at all advanced,	- - -	Page 120
Example continued,	- - -	121
If wife is barred by settlement, children to have the whole,	- - -	ib.
Customary share vests in the children on the intestate's death, in contradistinction to the custom of London,	- - -	ib.
Children's share being vested on intestate's death, if either die without will, his or her share must fall under the statute of distribution,	- - -	122
Infants at certain ages may make wills, and thereby dispose of their personal estate, but cannot dispose of real estate under 21 years of age,	- - -	ib.
Observations on the use and benefit a will may be to a man's family or relations,	- - -	ib.
As where he gives them thereby just as much as the law would intitle them to in case he died intestate,	- - -	ib.
As where he leaves a wife and several children of age, some of them advanced in part or in whole,	- - -	123
As where he leaves no wife, but children under age,	- - -	124
Will should be made by a person sufficiently versed in the law,	- - -	ib.
Consequences that have ensued by wills being made by persons not sufficiently versed in the law	- - -	125
Method for preventing a will being clandestinely destroyed during the testator's life, or concealed after his death,	- - -	ib.

ERRATA.

Page. Line.

41, — 26, *for seeme xpedient, read seem expedient.*

50, — 21, *after persons, add who.*

57, — 26, *for he, read the.*

61, — 10, *after or, add them.*

77, — In the second note, *read I P. Will. 25.*

THE
WILL WHICH THE LAW MAKES:

O R,

How it DISPOSES of a PERSON'S ESTATE, in case
he dies, without WILL or TESTAMENT.

C H A P. I.

*Of Intestates. Of Administration: why it should
be obtained, and who are intitled thereto. By
whom it is to be granted. The Method of
obtaining it, and the Expence thereof. How
the same may be revoked.*

SECTION THE FIRST.

OF INTESTATES.

THERE are divers kinds of Intestates. One that makes no will at all; another that makes a will and executors, and they refuse to act: in this case he dies *quasi intestatus*^a; that is, as if intestate. But this latter is not that kind of intestacy here intended: for in this case the law does not dispose of the estate; as here administration is to be granted *cum testamento annexo*, that is, with the testament annexed; and then the duty of the administrator is very little different from that of an executor^b; he being to adhere to the testament, which is to be his guide in disposing of the estate and effects of the deceased. But as the

^a 2 Inst. 397.

^b Black. Com. 2 V. 504.

B former,

former is that which is here intended, I shall briefly take notice of the distinction Wentworth makes between a will and a testament, without entering into a minute discussion of intestacy, which would be foreign to this subject; the intent whereof is, not to point out the various kinds of intestacy; but to shew how the law disposes of a person's estate in case he dies wholly intestate.—It is called a will, says Wentworth, when there is an executor appointed; and when there is none, it is termed a testament. So there may be a will where there is no testament, and a testament where there is no will^c. And where a testament is made without an executor being named, this testament is to be adhered to as a guide to the administrator in disposing of the estate, in the same manner as where one or more executors are named, and they refuse to act^d.

SECTION THE SECOND.

OF ADMINISTRATION: WHY IT SHOULD BE OBTAINED, AND WHO ARE INTITLED THERETO.

AN administrator cannot act before letters of administration are granted to him^e. But when these are granted, the person deputed by the ordinary, that is, the person who grants the letters of administration, to administer the intestate's goods, shall have an action to demand and recover, as executor, the debts due to the intestate^f.

If the deceased dies wholly intestate, without making either will or testament, then general letters of administration must be granted by the ordinary to such administrator as the statutes of 31 Edw. III. c. 11. and 21 Hen. VIII. c. 5. direct; and in consequence of which, the ordinary is compellable to

^c Went. Off. Exec. 2.

^d Ibid.

^e 1 Salk. 301.

^f Stat. 31 Edw. III. c. 11.

grant administration of the goods and chattels of the wife to the husband, or his representatives^g; that is, his executors or administrators, who, if the husband dies before administration taken, will be intitled in equity, and not the wife's next of kin^h. And that the administration of the wife's goods of right appertaineth to her husband, is confirmed by the statute of the 29 Car. II. c. 3. which enacteth, that the statute of the 22 & 23 Car. II. c. 10. concerning the distribution of intestate effects, shall not extend to the estates of *femes-covert* that shall die intestate; but that their husbands may demand and have administration of their rights, credits, and other personal estates, and recover and enjoy the sameⁱ. But if the wife was executrix to another; then, as to the goods which she had in that capacity, administration must be granted to the testator's next of kin^k.

By the statutes of Edward the Third and Henry the Eighth, before mentioned, the ordinary is compellable to grant administration of the husband's effects to the widow, or next of kin. But he may grant it to both, or either, at his discretion^l. For, it being moved for a *mandamus*^m to the

^g Black. Com. 2 V. 504.

^h Cro. Car. 106. 1 P. Will. 381.

^j Atk. 526.

ⁱ The husband has seldom occasion for taking administration on the death of his wife, unless it is to recover something that appertained to the wife, which she was not possessed of during the marriage; for on the marriage, all the chattels personal she is possessed of, immediately vest in her husband, and her chattels real he may make his own if he will. What these are, see p. 28, 29.

^k 3 Salk. 21.

^l Black. Com. 2 V. 496. 504.

^m *Mandamus* is a writ, whereby a command issues in the King's name, from the court of King's Bench, directed to any person, corporation, or inferior court of judicature, within the

King's dominions, requiring them to do some particular thing therein specified, which appertains to their office and duty. And this writ may be obtained for an infinite number of other purposes. It is grounded on a suggestion, by the oath of the party injured, of his own right and the denial of justice. Black. Com. 3 V. p. 110. The matter for which this writ is obtained must be laid before the court. 3 New Abr. 528. And as the matter must be laid before the court, it must be in term time, when the court is sitting. The manner of laying it before the court is by counsel, who moves the court on the oath of the injured party; which oath is delivered to him in writing, with his instructions, as previously drawn up by an attorney.

4 *The DISPOSAL of a PERSON'S ESTATE*

official of the bishop of Gloucester, to commit administration to the widow of an intestate, the court observed, That would be to deprive the ordinary of his election, in granting it to her, or the next of kin; and therefore ordered the mandamus to be taken generally, to grant administration of the goods of the intestateⁿ.—The ordinary may grant administration, either jointly or separately; for he may grant several administrations of several parts of the goods of the intestate^o; as where a man died intestate, leaving a wife and a brother, the ordinary had granted administration of some particular debts to the brother, and the residue to the wife. It was agreed by the court, that the ordinary might grant administration to the brother, as to part, and to the wife for the rest, in which case neither could complain; since the ordinary need not have granted any part of the administration to the party complaining. But if the intestate leave a bond of 100*l*. the ordinary cannot grant administration of 50*l*. to one person, and 50*l*. to another, because this is an entire thing^p.—Among the kindred, those are to be preferred that are the nearest in degree to the intestate; but of persons in equal degree, the ordinary may take which he pleases^q. The nearness of degree shall be reckoned according to the computation of the civil, and not of the canon law^r: and therefore, where there be both parents and children of the deceased, the children are intitled to the administration in preference to the parents, though both are in equal degree of kindred; and on failure of children, the parents are intitled^s. Then follow brothers, grandfathers, uncles, or nephews, (and the females of each class respectively,) and lastly, cousins.—The half blood^t is admitted to the administration as well as the whole:

ⁿ Str. 552.

^o 1 Roll's Abr. 908.

^p 1 Salk. 36.

^q Black. Com. 2 V. 504.

^r How the nearness of degree is

reckoned according to the Civil Law.

See pag. 78.

^s Black. Com. 2 V. 504.

^t Who the half blood are, see pag. 71.

for they are of the kindred of the intestate, and only excluded from inheritances of land. Therefore the brother of the half blood shall exclude the uncle of the whole blood^u, and the ordinary may grant administration to the sister of the half, or the brother of the whole blood, at his own discretion^v. But if there is a brother and a sister of the half blood, and the sister is married, then it must be granted to the brother, and not to her and her husband; because in effect it makes the husband administrator, who is not of kin to the intestate; and if she die, the husband would still continue administrator, and so might possess himself of the whole personal estate^w.—If the right of administration devolves upon an infant, the ordinary is to grant administration till he arrives at the age of twenty-one; because an infant cannot, before his full age, give bond to administer faithfully^x. And as such an administrator is but in nature of a curator for the infant, and has no interest or benefit in the intestate's estate; but in right of the infant, it has always been held discretionary in the ordinary to whom to grant it, and therefore it hath been frequently adjudged, that he is not obliged, within the statute of Henry the Eighth, to grant it to the next of kin, either of the deceased or the infant^y.—If none of the kindred will take out administration, a creditor may by custom do it. And the ordinary may, in defect of all these, commit administration (as he might have done before the statute of Edward the Third, when the ordinary had the absolute disposal of intestates effects^z); to such a discreet person as he approves of; or may grant him letters *ad colligendum bona defuncti*; that is, to gather up the goods of the deceased, which neither make him executor nor administrator; his only business being to keep the goods in his safe custody, and to do other acts

^u 1 Black. Com. 2 V. 505.

^v *Ibid.*

^w 3 Salk. 21.

^x Godolph. 102. 5 Co. Rep. 29.

^y Hob. 251. 1 New Abr. 381.

^z 2 New Abr. 398.

6 *The DISPOSAL of a PERSON'S ESTATE*

for the benefit of such as are intitled to the property of the deceased^a.—If an administrator dies, his executors are not administrators; but it behoveth the ordinary to commit a new administration^b. Where the administration is granted to two, and one of them dies, the administration surviveth to him who is living^c.

SECTION THE THIRD.

WHERE, AND BY WHOM ADMINISTRATION IS
TO BE GRANTED.

GENERALLY the person who is to grant administration is the bishop of the diocese, or his officer, where the intestate dwelled^d. And if all the goods of the deceased lie within the same jurisdiction, an administration granted by him is the only proper one; but if the deceased had *bona notabilia*, or chattels to the value of one hundred shillings, or five pounds, in two distinct dioceses; then administration must be taken out before the metropolitan of the province^e. But if a man die upon a journey, the goods that he then hath about or with him, shall not be as *bona notabilia* to cause administration to be committed in the prerogative^f.—Debts owing to the intestate are *bona notabilia*, as well as goods in possession^g. And they shall be *bona notabilia* in that diocese where the bond or other specialties be, and not where the debtor inhabits^h. So judgments obtained in the courts at Westminster, upon actions laid in the country, are *bona notabilia*; not where the action was laid, but where the judgment was obtained, because the record is thereⁱ. But if the debts be only by simple contract, without specialty, then they are to be esteemed *bona notabilia* in the place where the debtor is^k. So a bill of exchange shall be said to be *bona notabilia* where the debtor is, and not where the bill is; for it is no specialty in law: for if the administrator pays debts upon

^a Went. Off. Exer. chap. 14.

^b 1 Roll's Abr. 907.

^c Cas. Talb. 127.

^d Swinb. 427.

^e Black. Com. 2 V. 509.

^f Swinb. 438, 439.

^g 1 Roll's Abr. 909.

^h *Ibid.*

ⁱ Carth. 148.

^k Went. Off. Exec. 46.

simple

simple contract, or suffers judgment against him, in such actions he may plead such payment or judgment in bar to an action upon a bill of exchange¹.—Where one dies possessed of goods in London and Dublin, in such case the resolution seems to have been, that the archbishop of Canterbury, by his prerogative, was to grant administration of the goods in London, and the archbishop of Dublin for those in Dublin^m. If one die in Ireland, and have nothing but a specialty for money, and that specialty doth lie in England, the ordinary of the diocese, within which the place is where the specialty lies, shall commit the administration; and if the ordinary of another diocese grant it, the administration is void: and therefore the case was, a merchant in Ireland was bound in an obligation of forty pounds to one J. S. in London, and the obligation was made in Ireland, but remained always in London, and the merchant died intestate in the county of Bedford in England, and a bishop of Ireland did commit the administration to one, and the archbishop of Canterbury did commit it to the wife of the intestate, who had the obligation: in this case, the last administration was adjudged good: and it was there held, that the administration shall be granted by the ordinary of the place where the specialty doth lie at the time of the death of the intestate, and not by the ordinary of the place where the debt beganⁿ.—In case a person has *bona notabilia* both in the province of York and Canterbury, administration must be taken out before both metropolitans, if within the jurisdiction of each there are *bona notabilia* in divers dioceses; or else if in either of the provinces, the goods lay in one diocese, then administration must be taken out before the particular bishops in whose several dioceses the goods are^o. Or if the deceased had goods in the jurisdiction of one metropolitan, lying in divers dioceses, and in the

¹ 3 Salk. 164.

ⁿ Shep. Touch. 443.

^m Gibb. 472. 4 Burn's Eccles. Law, 182. ^o Went. Off. Exec. 46.

8 *The DISPOSAL of a PERSON'S ESTATE*

other, but in one diocese; then administration must be taken out before the archbishop, who has jurisdiction over the divers dioceses, and before the particular bishop of the diocese^p.—The granting of administration of the goods of every bishop, although he hath not goods but in his own jurisdiction, doth belong to the archbishop^q.

THERE are certain peculiar ecclesiastical jurisdictions, where, by prescription, or composition, or other special title, the granting administration of the goods of such as dwell and die within those places, doth appertain to the judge of that peculiar^r.—There is the court of peculiars, which is a branch of, and annexed to the court of arches. It has a jurisdiction over all those parishes dispersed throughout the province of Canterbury, in the midst of other dioceses, which are exempt from the ordinary's jurisdiction, and subject to the metropolitan only^s.—Where one dies possessed of goods in the diocese of an archbishop, and in a peculiar of the same diocese; there shall be several administrations, and the archbishop shall have no prerogative, because the peculiar was first derived out of his jurisdiction^t. But where one dies possessed of goods in several peculiars within the same diocese; in that case administration shall not be granted by the bishop of the diocese, but by the metropolitan; inasmuch as they are exempt from ordinary jurisdiction^u.

By the statute of the 4 Ann. c. 16. sect. 26. The power of granting probates of wills, and letters of administration, of the goods of persons intitled to wages, for work done in her Majesty's yards and docks, is declared to be in the ordinary of the diocese; or such other persons, to whom the ordinary power of probates of wills, or granting of administrations do

^p Went. Off. Exec. 46.

^q 4 Inst. 335.

^r Swinb. 427.

^s Black. Com. 3 V. 65.

^t Gibson, 472. Cro. Eliz. 739.

^u Gibson, 472. Swinb. 440.

belong,

belong, where such persons shall die; and the wages due to such persons shall not be taken to be *bona notabilia*, to found the jurisdiction of the prerogative court.

THE prerogative is grounded upon this reasonable foundation: that as bishops were formerly themselves the administrators to all intestates in their own diocese; and as the present administrators are in effect no other than their officers or substitutes, it was impossible for the bishops, or those who acted under them, to collect any goods of the deceased, other than such as lay within their own dioceses, beyond which their episcopal authority doth not extend. And it would be extremely troublesome, if as many administrations were to be granted, as there are dioceses within which the deceased had *bona notabilia*, besides the uncertainty which creditors and legatees would be at, in case different administrators were appointed, to ascertain the fund out of which their demands are to be paid. A prerogative is therefore very prudently vested in the metropolitan of each province, to make, in such cases, one administration serve for all ^v.

It has been declared, that administrations committed by the archbishop, by his prerogative, to one who did not die possessed of goods in divers dioceses, were merely void. But the more current doctrine is, that such administrations are not void, like those granted by a bishop, where are *bona notabilia*, but only voidable by sentence; because the metropolitan hath jurisdiction over all the dioceses in his province, whereas a bishop can by no means have jurisdiction in another diocese ^w.—It is said, that if administration be committed in a diocese where there are *bona notabilia*, though

^v Black. Com. 2 V. 309.

^w 4 Burn's Eccles. Law, 184.

such grant be *ipso facto* * void, yet they do not grant a new administration in the prerogative court, before they have repealed that ; and in that case they shall not be prohibited.

As it hath been the case that many have been by apparitors, both of inferior courts and the courts of the archbishop's prerogative, much distracted, by being diversly called and summoned for probate of wills, or to take administrations of the goods of persons dying intestate, and thereby have been vexed and grieved with many causeless and unnecessary troubles and expences ; by Canon 92. " It is constituted and
 " appointed, that all chancellors, commissaries, or officials,
 " or any other exercising ecclesiastical jurisdiction whatsoever,
 " shall at the first, charge with an oath all persons called, or voluntarily appearing before them for the probate of any will,
 " or the administration of any goods, whether they know, or
 " (moved by any special inducement) do firmly believe, that
 " the party deceased (whose testament or goods depend now
 " in question) had, at the time of his or her death, any goods
 " or good debts, in any other diocese or dioceses, or peculiar
 " jurisdiction within that province, than in that wherein the
 " said party died, amounting to the value of 5*l*. And if the
 " said person cited, or voluntarily appearing before him, shall
 " upon his oath affirm, that he knoweth, or (as aforesaid)
 " firmly believeth, that the said party deceased had goods or
 " good debts in any other diocese or dioceses, or peculiar jurisdiction within the said province to the value of 5*l*. and
 " particularly specify and declare the same, then shall he presently dismiss him, not presuming to intermeddle with the

* *Ipso facto* void, signifies, that it is void without any decree or sentence. As in the case of a person obtaining two or more preferments in the church with cure, not qualified by dispensation,

&c. the first living is void *ipso facto*, viz. without any declaratory sentence, and the patron may present to it. Dyer, 275.

Y 4 Burn's Eccles. Law, 185.

“ probate of the will, or to grant administration of the goods
“ of the party so dying intestate. Neither shall he require or
“ exact any other charges of the said parties, more than such
“ only as are due for the citation, and other process had, and
“ used against the said parties, upon their further contumacy ;
“ but shall openly and plainly declare and profess, that the
“ said cause belongeth to the prerogative of the archbishop of
“ that province ; admonishing the party to prove the will, or
“ require administration of the goods, of the court of the said
“ prerogative, and to exhibit before him, the said judge, the
“ probate or administration under the seal of the prerogative,
“ within forty days next following. And if any chancellor,
“ commissary, official, or other exercising ecclesiastical juris-
“ diction whatsoever, or any their register shall offend herein ;
“ then let him be *ipso facto* suspended from the execution of his
“ office, not to be absolved or released until he have restored
“ to the party all expences by him laid out contrary to the
“ tenor of the premises ; and every such probate of any testa-
“ ment, or administration of goods so granted, shall be held
“ void and frustrate to all effects of the law whatsoever. And
“ it is hereby further charged and enjoined, that the register of
“ every inferior judge do, without all difficulty or delay, cer-
“ tify and inform the apparitor of the prerogative court, re-
“ pairing to him once a month, and no oftener, what execu-
“ tors or administrators have been by his said judge, for the
“ incompetency of his own jurisdiction, dismissed to the said
“ prerogative court within the month next before ; under
“ pain of a month’s suspension from the exercise of his office
“ for every default therein.” But it is provided that this canon,
or any thing therein contained, be not prejudicial to any
composition between the archbishop and any bishop or other
ordinary, nor to any inferior judge that shall grant any pro-
bate

bate of testament or administration of goods to any party that shall *voluntarily* desire it, both out of the said inferior court, and also out of the prerogative. And likewise, that if any man die *in itinere*, that is, on a journey, the goods that he hath about him at that present, shall not cause his testament or administration to be liable unto the prerogative court.

IN respect of the prerogative court, by Canon 93, "It is decreed and ordained, that no judge of the archbishop's prerogative shall cite, or cause to be cited *ex officio*^a, any person whatsoever to any of the before-mentioned intents, unless he hath knowledge that the party deceased was, at the time of his death, possessed of goods and chattels in some other diocese or dioceses, or peculiar jurisdiction within that province, than in that wherein he died, amounting to the value of 5l. at the least: and decreed and declared, that whoso hath not goods in divers dioceses to the said sum or value, shall not be accounted to have *bona notabilia*. Always provided, that this clause here, and in the former constitution mentioned, shall not prejudice those dioceses, whereby composition or custom *bona notabilia*, are rated at a greater sum^a. And if any judge of the prerogative court, or any, his surrogate, his register or apparitor, shall cite or cause any person to be cited into his court, contrary to the tenor of the premises, he shall restore to the party so cited

^a It is so called from the power a person has, by virtue of an office, to do certain acts without being applied to: as a justice of peace may not only grant surety of the peace, at the complaint or request of any person, but he may demand and take it *ex officio* at discretion, &c. Dalt. 270.

^a The law concerning this matter is, that five pounds is the sum or value of notable goods. But where by composition or custom in any county, *bona notabilia* are rated at a greater sum, the same is to continue unaltered; as in the diocese of London, it is 10l. by composition. 4 Burn's Eccles. Law, 181.

“ all his costs and charges, and the acts and proceedings in
“ that behalf shall be held void and frustrate. Which ex-
“ pences, if the said judge or register, or apparitor, shall re-
“ fuse accordingly to pay; he shall be suspended from the exer-
“ cise of his office, until he yield to the performance thereof.”

WHAT has been said under this head respecting admini-
stration, is alike applicable to wills and testaments. For
regularly he that shall have the probate of a will, in case
where a man doth make a will, shall have the granting of
administration of his goods and chattels in case he dies in-
testate^b.

SECTION THE FOURTH.

WHAT THE PERSON, APPLYING FOR ADMINI-
STRATION, IS TO DO BEFORE IT IS GRANTED.

THE practice is not to issue letters of administration,
until after the expiration of fourteen days from the death
of the intestate; unless for special cause (as, that the goods
would otherwise perish, or the like) the judge shall think fit
to decree them sooner. On taking out letters of admini-
stration, the administrator takes an oath, which is usually in
this form: “ You shall swear, that you believe A. B.
“ deceased died without a will; and that you will well and
“ truly administer all and every the goods of the said de-
“ ceased, and pay his debts as far as his goods will extend;
“ and that you will exhibit a true, full, and perfect inven-
“ tory of the said goods of the deceased, and render a true
“ account of your administration into the — court of
“ C. when you shall be thereunto lawfully required^c.” You
also swear that you are the widow, son, daughter, next of
kin, or creditor, [*as may be the case*] of the said A. B. and

^b Shep. Touch. 443.

^c 4 Burn's Eccles. Law, 231.

that

that the whole of the goods and chattels^d he died possessed of, do not in value exceed the sum of, 1. “ So help you God.”

By the statute of the 22 & 23 Car. II. c. 10. *It is enacted, that all ordinaries, as well the judges of the prerogative courts of Canterbury and York, as all other ordinaries and ecclesiastical judges, and every of them, having power to commit administration of the goods of persons dying intestate, shall and may, upon their granting and committing of administrations of the goods of persons dying intestate, of the person or persons to whom any administration is to be committed, take sufficient bond with two or more able sureties, respect being had to the value of the estate, in the name of the ordinary, with the condition in form and manner following.*

“ THE condition of this obligation is such, that if the
 “ within bounden A. B. administrator of all and singular
 “ the goods, chattels, and credits of C. D. deceased, do
 “ make or cause to be made a true and perfect inventory of
 “ all and singular the goods, chattels, and credits of the said
 “ deceased, which have or shall come to the hands, possession,
 “ or knowledge of him the said A. B. or into the hands
 “ and possession of any other person or persons for him, and
 “ the same, so made, do exhibit or cause to be exhibited into
 “ the registry of court, at or before the day
 “ of next ensuing; and the same goods, chattels,
 “ and credits, and all other the goods, chattels, and credits
 “ of the said deceased at the time of his death, which at any
 “ time after shall come to the hands or possession of the said
 “ A. B. or into the hands and possession of any other person or
 “ persons for him, do well and truly administer according to
 “ law; and further do make, or cause to be made, a true and
 “ just account of his said administration, at or before the
 “ day of ; and all the rest and residue of the said goods,
 “ chattels, and credits which shall be found remaining upon

^d The administration has nothing to do with the real estate in case the deceased leaves any.—For what is real estate, See pag. 86.

“ the said administrator’s account, the same being first examin-
“ ed and allowed of by the judge or judges for the time being
“ of the said court, shall deliver and pay unto such person or
“ persons respectively, as the said judge or judges, by his or
“ their decree or sentence, pursuant to the true intent and
“ meaning of this act, shall limit and appoint; and if it
“ shall hereafter appear, that any last will and testament was
“ made by the said deceased, and the executor or executors
“ therein named do exhibit the same into the said court,
“ making request to have it allowed and approved accord-
“ ingly, if the said A. B. within bounden, being there-
“ unto required, do render and deliver the said letters of ad-
“ ministration (approbation of such testament being first
“ had and made) in the said court; then this obligation to
“ be void, and of none effect, or else to remain in full force
“ and virtue.”

THIS condition, as to the administering truly, according to law, is to be intended in bringing in the administrator’s account, and not in paying the debts of the intestate, and therefore a creditor shall not take an assignment of the bond, and sue it, and for breach assign non-payment of a debt to him, or a devastavit committed by the administrator; for that would be endless^e.—By the statute of the 1 Jac. II. c. 17. Sect. 6. No administrator shall be cited into court to render an account of the personal estate of his intestate, otherwise than by an inventory thereof, unless at the instance of some person in behalf of a minor, or having a demand out of such estate as a creditor or next of kin; nor shall be compellable to account before any ordinary or judge empowered by the act of 22 & 23 Car. II. otherwise than as mentioned by this

^e 1 Salk. 316.

act. The ecclesiastical court understand no more by an account, than some account in nature of an inventory^f; and the ordinary, after the administrator has exhibited an inventory, cannot compel the administrator to account, but it must be at the instance of the party (as one in behalf of a minor, or one having demand out of the intestate's estate, as a creditor or next of kin); and therefore the inventory and account are, as to the ordinary, the same thing^g.

SECTION THE FIFTH.

THE FEES AND EXPENCE OF OBTAINING THE ADMINISTRATION.

THE fees for administration now taken by the practitioners in Doctors Commons, as I conceive, are much the same with those taken in other ecclesiastical courts throughout the kingdom, and nearly the same as the fees that were allowed to be taken by those practitioners, as settled by a jury, Nov. 19, 1734, and are as follows, *viz.* The whole fees for an administration under 20l. that is, where the goods and chattels do not amount to 20l. in value; of a sailor in the King's service, 7s. For an administration under five pounds in other cases, 7s. For an administration under 20l., 1l. 1s. And under 40l., 1l. 18s. For an administration above 40l., 2l. 5s.^h, which is now (as I conceive, by divers bills that I have seen paid for administrations in the course of some years past) about 2l. 10s. including therein the stamp duty for the bond before mentioned, and also the several stamp duties laid on by the statutes of the 5 W. & M. c. 21. and 9 W. III. c. 25. whereby it is enacted, that for every skin or piece of vellum or parchment, or sheet or piece of paper, on which shall be written any letters of administration (except of common

^f For more concerning the inventory, and what may be required of the administrator before administration is granted, See pag. 37—42.

^g 3 Atk. 248. For more concerning this, See pag. 61—63.

^h Floyer's Proctor's Practice 172.

seamen or common soldiers slain or dead in the service) for any estate above the value of 20l. shall be paid a stamp duty of 10s. And now, by the statute of the 19 Geo. III. c. 66. if the estate, for which the latter administration is taken, amounts to 100l. there must be one pound for a stamp duty added to the 2l. 10s. which will make it 3l. 10s. And if the estate amounts to 300l. or upwards, there must be another pound added, whereby the administration will amount to 4l. 10s. And by the statute of the 23 Geo. III. c. 58. where the estate is of, or above the value of 100l. there is an additional stamp duty of 20s. which makes the above 3l. 10s. to amount to 4l. 10s. And where the estate is of or above, the value of 300l. there is an additional stamp duty of 20s. which makes the above 4l. 10s. to amount to 5l. 10s. And where the estate is of, or above the value of 600l. there is an additional stamp duty of 20s. which makes the administration amount to 6l. 10s. And where the estate is of, or above the value of 1000l. there is an additional stamp duty of 20s. which makes the administration amount to 7l. 10s. And the fees and expence of proving a will in common form is about 7 or 8s. less than what is paid for letters of administration; that is, provided the will be very short; but if it is of any considerable length, the cost will be considerably more, in proportion to the length thereof. But what has been said respecting these fees, must be understood to be when the administration issues of course, or without being opposed, and on personal application made for the same; for if the granting it is opposed, the expence of obtaining it will be according to the effect of the opposition, or the length such opposition may be carried to after a caveat is entered, or suit commenced. And if personal application is not made for the administration, but instead thereof a commission is issued for the administrator to administer (as is usual when the admini-

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strator is ill, or lives at a great distance from town), the expence of a commission for an administration, instructions, and return, the book ^h says, is 1l. 10s.

SECTION THE SIXTH.

HOW, AND FOR WHAT REASON, THE ADMINISTRATION MAY BE REVOKED.

IF an administration is granted, and afterwards a will is produced and proved, the administration shall be revoked ⁱ.—The ordinary cannot repeal an administration at his pleasure ^k.—In the case of Sir George Sands, the father administered to his son, and afterwards a woman, pretending to be the son's wife, sued for a repeal; but a prohibition ^l was granted, because the ordinary had an election to grant it either to the father or wife, and by granting it to the father, had executed his power ^m. But where a feme-covert, that is, a married woman, died intestate, and the next of kin to her obtained administration, and the husband sued for a repeal, a prohibition was denied, because in this case the ordinary had no power, or election, to grant it to any person but the husband ⁿ.

THE rule seems to be, that an administration may be repealed, although not arbitrarily, except where there shall be just cause for so doing; as if the administrator should become lunatic or the like; of which the temporal courts are to judge. So if the next of kin, at the

^h Floyer's *Proctor's Practice*, 172.

ⁱ 2 Roll's *Abr.* 907. See more as to this pag. 47.

^k Swinb. a. 381.

^l A *prohibition*, is a writ issuing properly out of the court of King's Bench; being the King's prerogative writ; but for the furtherance of justice, it may now also be had in some cases out of the court of Chancery, Common Pleas,

or Exchequer, directed to the judge and parties of a suit in any inferior court. Black. Com. 2 V. 112. It is a writ to forbid any court to proceed in any cause there depending, on suggestion that the cognizance thereof belongeth not to the court. Fitzh. Nat. Brev. 39.

^m Raym. 93.

ⁿ 3 Salk. 22. see pag. 3.

death of the intestate, happen to be incapable of administering, by reason of attain or excommunication, and the ordinary commits it to another; if he afterwards becomes capable, the ordinary may repeal the first administration, and commit it to the next of kin^o. And the same is much more to be said where the administration was undue *ab initio*, that is, from the beginning, whether as granted to any other than the next of kin, or granted by an incompetent authority, or in an irregular manner, without citing those who ought to have been cited^p.

WHERE a man died intestate, leaving a wife and a sister, the sister, upon the common oath, that she believed he died intestate, without wife or children, obtained administration. And in a suit to repeal it, as obtained by surprise, it appeared to be the custom of the court, never to grant it to the next of kin, until the wife is cited. The sister moved for a prohibition, and insisted that the ordinary had executed his authority. But the court held, that the ordinary could not be said to have executed his authority, having never had an opportunity to make the election which the statute of the 21 Hen. VIII. c. 5. gives him; that it was incident to every court, to rectify the mistakes they were led into by misrepresentation of the parties; that if there were no surprise (of which the court below was judge) there ought to be a prohibition, because then the administration will have been duly and regularly granted; but there was a plain surprise, and therefore they denied a prohibition^q. — It is said, that an administration may be repealed, without any sentence of revocation to be given in any spiritual court, or otherwise; as by granting a new administration^r.

^o 4 Burn's Eccles. Law. 236.

^q *Ibid.* 237.

^p *Ibid.*

^r *Ibid.*

WHERE the administrator, after many goods administered, had his administration revoked, and it was committed to B. who sued the first administrator for goods unduly administered; it was held, that there was no remedy but in *Chancery*. But it is conceived in such a case as this, the second administrator might maintain an action at law against the first, for money had and received, or trover for any goods remaining in his possession^s.—See more concerning administration revoked, p. 50.

C H A P. II.

Of the Administrator.

SECTION THE FIRST.

HIS POWER BY VIRTUE OF THE ADMINISTRATION.

HAVING seen who are entitled to the administration, and of whom the same is to be obtained; with an account of the fees and expence of obtaining it, and how the same may be revoked; we may now consider the power the administrator has, by having the administration thus granted to him. Somewhat of this we have already seen, as that he cannot act before it is granted to him, and that after it is, he may bring actions as an executor may^t. We have seen also the reason why administration should be thus granted; as that the bishops were formerly the administra-

^s Jac. Law Dict. 10 edit, tit. Administrator.

^t Pag. 2.

tors of the goods and chattels of persons dying intestate^u, and this continued to be the case till the statute of the 31 Edw. III. before-mentioned^w was made^x. But now administrators are put upon the same footing with regard to suits, and to accounting, as executors appointed by will^y.—Where there be two administrators, and one dies, the administration survives, and doth not cease^z: it not being like a letter of attorney to two, where by the death of one the authority ceaseth; but is rather an office; and administrators are enabled to bring actions in their own names: they come in the place of executors, and therefore the office survives^a. But if there is but one administrator, and he dies, his executors are not administrators, but it be-
hoves the ordinary to commit a new administration^b. When an administrator hath judgment, and dies, his executors (as such) may not sue execution of the judgment; for none shall have execution of this judgment, but he who shall be subject to the payment of the debts of the first intestate^c.——If there be two or more administrators, one of them cannot sell goods, or release debts without the others joining; for they have but one authority given them by the bishop over the goods: which authority being given to many, is to be executed by all of them joined together^d. But it is otherwise in respect to co-executors; these being in law but one person, therefore the act of one is the act of them all, and the possession of one is accounted the possession of all^e.

AN administrator, by virtue of his administration, hath interest in all the chattels, real and personal, of the intestate, and all the goods and chattels, either in possession or action^f, in like manner as an executor in the goods of the testator deceased. And all those goods and chattels which belonged

^u Page 9.

^w Page 2.

^x Black. Com. 2 V. 495.

^y *Ibid.* 496.

^z Page 6.

^a 2 Vern. 514.

^b Page 6.

^c 5 Co. Rep. 9.

^d Lord Bacon's Tracts, 162. 1 Atk. 460.

^e Swinb. 328.

^f For the particulars of these, see p. 28.

to the intestate at the time of his death, and which came to the hands of the administrator, shall be *assets*, or sufficient goods and chattels, to make him chargeable to creditors, as executors are to creditors and legatees. But before they come to his hands he is not chargeable, as we shall see more of hereafter^h. — An executor or administrator shall regularly charge others for any debt or duty due to the deceased, as the deceased himself might have done; and the same actions the deceased might have had, the same actions, for the most part, the executor or administrator may have also. But an executor or administrator shall not charge another, or have any action against him for a personal wrong done to the testator, when the wrong done to his person, or that which is his, is of that nature for which damages only are to be recovered: and therefore an executor or administrator cannot sue another for beating or wounding of the deceasedⁱ. In actions merely personal, arising *ex delicto*, for wrongs actually done or committed by the defendant, as trespass, battery, and slander, the rule is *actio personalis moritur cum persona*, that a personal action dies with the person; and it never shall be revived, either by, or against the executors, or other representatives. For neither the executors of the plaintiff have received, nor those of the defendant have committed, in their own personal capacity, any manner of wrong or injury. But in actions arising *ex contractu*, by breach of promise and the like, where the right descends to the representatives of the plaintiff, and those of the defendant have assets to answer the demand, though the suits shall abate by the death of the parties, yet they may be revived against, or by the executors or administrators; being indeed rather actions against the property, than the person, in which the executors, or administrators,

^g Wood's Inst. New Edit. 339.

ⁱ Shep. Touch. 459.

^h Page 46, 47.

have now the same interest that the testator or intestate had before ^k.

By the statute of the 31 Edw. III. before-mentioned, administrators shall have an action to demand and recover, as executors, the debts due to the intestate. So if a man take from the executor or administrator the goods of the deceased; for this they must bring their action at common law; for they cannot sue for the goods of the deceased in a court ecclesiastical ^l. And tenants may be sued at the common law by executors or administrators for rent behind, and due to the testator or intestate in his lifetime, or at the time of his death; and they may for the same distrain the land charged with the rent ^m.

By the statute of the 32 Hen. VIII. c. 37. sect. 1. after reciting, that by the order of the common law, the executors or administrators of tenants in fee-simple, tenants in fee-tail, and tenants for term of life, of rent-services, rent-charges, rent-secks, and fee-farms, had no remedy to recover such arrears of the said rents or fee-farms as were due unto the testators, in their lives, nor yet the heirs of such testator, nor any person having the reversion of his estate after his decease: it is enacted, that the executors or administrators of tenants in fee-simple, tenants in fee-tail, and tenants for term of life, of rent-services, rent-charges, rent-secks, and fee-farms, unto whom any such rent or fee-farm be due, shall have an action of debt for such arrears against the tenants who ought to have paid in the life-time of their testator, or against their executors or administrators, or may distrain for the arrears on the land, or other hereditaments chargeable therewith, so long as the lands or

^k Black. Com. 3 V. 302.

^m Swinb. 18,

^l Swinb. 18, 10 Mod. 21.

24 *The DISPOSAL of a PERSON'S ESTATE*

other hereditaments, continue in the seisin or possession of the tenant in demesne; who ought immediately to have paid the rent or fee-farm, or the seisin, or possession of any other person claiming only from the same tenant by purchase, gift, or descent, in like manner as their testator might have done.

TENANTS in fee-simple, fee-tail, or for term of life, are those who hold any messuages, lands, or tenements, in fee-simple, fee-tail, or for term of lifeⁿ; and as they may hold any messuages, lands, or tenements, in this manner, so they may rent-service, rent-charge, rent-seck, and fee-farm or fee-farm rent, which are called incorporeal hereditaments, as being a right issuing out of a thing corporate, though not the thing itself, but something collateral thereto, which may be lands or houses^o. *Rent-service* is so called, because it hath some corporeal service incident to it, as at the least fealty, or the feudal oath of fidelity. For, if a tenant holds his land by fealty, and ten shillings rent; or by service of plowing the lord's land, and five shillings rent; these pecuniary rents, being connected with personal services, are therefore called rent-service^p. A *rent-charge* is where the owner of the rent hath no future interest, or reversion expectant in the land; as where a man by deed maketh over to others his whole estate in fee-simple, with a certain rent payable thereout, and adds to the deed a covenant or clause of distress, that if the rent be *arrear*, or behind, it shall be lawful to distrain for the same. In this case the land is liable to distress, not of common right, but by virtue of the clause in the deed: and therefore it is called a *rent-charge*; because in this manner the land is charged with a distress for the payment of it^q. *Rent-seck*, *reditus siccus*, or barren rent, is in effect nothing more than a

ⁿ Black. Com. 2 V. 59.

^o *Ibid.* 20.

^p *Ibid.* 42.

^q *Ibid.*

rent reserved by deed, but without any clause of distress¹. A *fee-farm* rent, is a rent-charge issuing out of an estate in fee; of at least one-fourth of the value of the lands, at the time of the reservation: for a grant of lands, reserving so considerable a rent, is indeed only letting lands to farm in fee-simple, instead of the usual methods for life or years².

THE word *demesne*, or as it is sometimes termed, *demeins*, or *demain*, is oftentimes used for a distinction between those lands that the lord of the manor hath in his own hands, or in the hands of his lessee demised, at a rack-rent, and such other lands appertaining to the manor which belong to free or copy-holders. *The tenant in demesne* before mentioned signifies the person seized or possessed of the inheritance.

By sect. 2. of the statute last mentioned, it is provided, that the same shall not extend to any manor or lordship in Wales, whereof the inhabitants have used to pay to every lord or owner thereof, at his first entry into the same, any sum for the redemption and discharge of all duties and penalties, wherewith the inhabitants were chargeable to any of the lords ancestors.

SECT. 3. If any man shall have, in right of his wife, any estate in fee-simple, fee-tail, or for term of life, in any rents or fee-farms, and the same be due and unpaid in the wife's life; the husband, after the death of his wife, his executors and administrators, shall have action of debt for the arrears, or may distrain for the same, as he might have done if his wife had been living.

SECT. 4. If any person shall have any rents or fee-farms, for term of life of any other person, and the same be due and unpaid in the life of such other person, and he die; he

¹ Black. Com. 2 V. 42.

² *Ibid.* 43. The learned author of the Notes on Co. Litt. says, the true meaning of fee-farm, is a perpetual farm or

rent; the name being founded on the perpetuity of the rent or service; not on the *quantum*. Co. Litt. 144. Note 5. 13 Edit.

to whom the same was due, his executors or administrators, may have an action of debt against the tenant *in demesne* who ought to have paid the same, when it was first due, his executors and administrators; or may distrain for the same upon such lands and tenements out of which the said rents or fee-farms were issuing and payable; in like manner and form as he might have done, if such person, by whose death, the aforesaid estate in the said rents and fee-farms, was determined and expired, had been in full life.

By the statute of the 11 Geo. II. c. 19. it being recited, that where any lessor or landlord, having only an estate for life, in lands, tenements, or hereditaments demised; happened to die, before or on the day, on which any rent was reserved or made payable; such rent, or any part thereof, was not by law recoverable, by the executors or administrators of such lessor or landlord; nor was the person in reversion intitled thereunto, any other than for the use and occupation of such lands, tenements, or hereditaments, from the death of the tenant for life; of which advantage had been often taken by the under-tenants, who thereby avoided paying any thing for the same; and for remedy thereof, it is enacted, that where any tenant for life shall happen to die before, or on the day, on which any rent was reserved or made payable, upon any demise or lease of any lands, tenements, or hereditaments, which determined on the death of such tenant for life; that the executors or administrators of such tenant for life, shall, in an action upon the case, recover of such tenant or under-tenants of such lands, tenements, or hereditaments; if such tenant for life die on the day on which the same was made payable, the whole, or if before such day, then a proportion of such rent,

rent, according to the time such tenant for life lived, of the last year or quarter of a year, or other time in which the said rent was growing due, making all just allowances.

To the end that a due regard be had to creditors, by the statute of the 22 & 23 Car. II. c. 10. commonly called the statute of distribution; it is enacted, that no distribution of the goods of any person dying intestate be made, till after one year be fully expired after the intestate's death.

—An administrator, as well as an executor, is allowed, among debts of equal degree, to pay himself first, by retaining in his hands so much as his debt amounts to. So if a person indebted to another makes his creditor or debtor executor, or if such creditor obtains letters of administration to his debtor, in these cases the law gives him a remedy for his debt, by allowing him to retain so much as will pay himself, before any other creditors whose debts are of equal degree. This is a remedy by mere act of law, and grounded upon this reason; that the executor cannot, without an apparent absurdity, commence a suit against himself, as representative of the deceased, to recover that which is due to him in his own private capacity: but having the whole personal estate in his hands, so much as is sufficient to answer his own demand is, by operation of law, applied to that particular purpose. Else by being made executor, he would be put in a worse condition than all the rest of the world besides; for, as he can commence no suit, he must be paid the last of any, and of course must lose his debt in case the estate of the testator should prove insolvent, unless he be allowed to retain it. But the executor shall not retain his own debt, in prejudice to those of a higher degree; for
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the law only puts him in the same situation, as if he had sued himself as executor, and recovered his debt; which he never could be supposed to have done, while debts of a higher nature subsisted. Neither shall one executor be allowed to retain his own debt in prejudice to that of his co-executor in equal degree; but both shall be discharged in proportion^t.—The power the administrator has, in favouring and preferring creditors in the course of paying debts, will be seen hereafter^u; together with some other powers he has vested in him^v.

SECTION THE SECOND.

THE PARTICULARS OF WHAT THE ADMINISTRATOR IS INTERESTED IN, BY VIRTUE OF HIS ADMINISTRATION.

HAVING shewn, that the administrator, by virtue of his administration, hath interest in all the chattels, real and personal, of the intestate, and all the goods and chattels either in possession or action^x; we come now to consider what these are in particular.

CHATTELS comprehend all goods, moveable and immoveable; except such as are in the nature of freehold or parcel of it; and this word by the common law extends to all moveable and immoveable goods. But estates of inheritance^y, or freehold^z, cannot by the common law be

^t Black. Com. 3 V. 18.

^u Pag. 53, 54, 56, 57, 58.

^v Pag. 43, 44.

^x Pag. 21.

^y For more particulars concerning estates of inheritance, see pag. 86.

^z Estates of freehold are either of inheritance or not of inheritance, and these not of inheritance are but for life only. Estates of freehold, not of inheritance, may be created by deed or grant; as where a lease is made of lands or tenements to a man to hold for the term

of his own life, or for that of any other person, or for more lives than one: in any of which cases he is styled tenant for life; only, when he holds the estate by the life of another, he is usually called tenant *pur autre vie*. Black. Com. 2 V. 104. 120.—A lease for 99 years, determinable upon a life or lives, is not a lease for life to make a freehold; but a lease for years, or chattel determinable upon life or lives, and an estate for 1000 years is not a freehold, or of so high a nature as an estate for life. Co. Litt. 46.

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termed goods and chattels. *Chattels* are either personal or real. *Personal*, as household-stuff, goods and wares in a shop; carts, ploughs, horses, oxen, sheep, and the like: and these are called personal in two respects; one because they belong immediately to the person of a man; the other, for that being any way injuriously with-held from him, he hath no other remedy to recover them but by personal action. *Chattels-real*, are such as either appertain, not immediately to the person, but to some other thing by way of dependency; as a box with charters of land, or such as are issuing out of some immoveable thing; as a lease, or rent for term of years: and chattels-real concern the reality, lands and tenements, interest in advowsons, in statutes merchant, and the like^a. But fishes in a pond, conies in a warren, deer in a park, pigeons in a dove-house, where the testator or intestate had the inheritance, or but for life, in the pond, warren, park, and dove-house; are not chattels at all, nor go to the executor or administrator; but to the heir with the inheritance: and therefore they are not to be put in the inventory of the goods and chattels of the party deceased. But if the testator or intestate, have any tame pigeons, deer, rabbits, pheasants, or partridges, they shall go to the executors or administrators; and though they were not tame, yet if they were kept alive in any room, cage, or such like place: so fish in a trunk; also young pigeons, though not tame, being in the dove-house, and not able to fly out^b. Also hounds, greyhounds, spaniels, and the like, as they may be valuable, and may serve not only for delight, but for profit, shall go to the executors or administrators^c. And they shall have all leases for years, though they may be for 1000 years^d, and all lands extended on any judgment, statute, or recognizance, and all arrears of rent due at the death of the testator or intestate^e. And all estates

^a Co. Litt. 118.

^b 4 Burn's Eccles. Law, 240.

^c *Ibid*.

^d Fitzh. Nat. Brev. 120.

^e 4 Burn's Eccles. Law, 242. Law of Test. 341.

pur autre vie, that is, estates held during the life of another, as before-mentioned. These being distributable by the statute of the 14 Geo. II. c. 20. shall, where a man dies intestate, and they were not made to him and his heirs, be distributed in the same manner as his personal estate; but it is otherwise if made to the intestate and his heirs. For which see more hereafter, p. 49.

CORN sown will also go to the executor or administrator, and not to the heir, so also will hops, though not sown, if planted, and saffron and hemp ^f. This being what is usually styled emblements, the doctrine of which extends not only to corn sown, but to roots planted, or other annual artificial profit^g, as clover, saint-foin, and the like, which was sown by the deceased ^h. But it is otherwise of fruit-trees, grafs, and the like; which are not planted annually at the expence and labour of the tenant, but are either the permanent, or natural profit of the earth ⁱ. So these latter go to the heir, and not to the executor or administrator. And Mr. Wentworth thinks, that roots in gardens, as carrots, parsnips, turnips, skirrets, and such like (which he says may be of value in gardens about London, and some great towns), shall not go to the executor, but to the heir, because they cannot be taken without digging and breaking the soil ^k. But it seems very clear by Lord Coke^l, and Sir William Blackstone^m, that these shall go to the executor or administrator; and not to the heir.

IF a man seized for life, or in fee, or tail in his own right, or in the right of his wife, and sows the ground with corn, but dies before it is ripe; his executors *or administrators* shall have it, and not the wife or heir: but grafs ready to be cut for hay, apples, pears, and other fruit on the trees, shall not go to the executors *or administrators*. And the reason of the dif-

^f 4 Burn's Eccles. Law, 242.

^g Black. Com. 2 V. 123.

^h 4 Burn's Eccles. Law, 242.

ⁱ Black. Com. 2 V. 123.

^k Went. Off. Exec. 62.

^l Co. Litt. 55.

^m Com. 2 V. 122.

ference is, because the former comes not merely from the soil, without the industry or manurance of man, as the latter doth. And if the wife had a lease for years, as executrix, and the husband sows the ground with corn, and dies before it is ripe; the corn shall go to his executors *or administrators*, or at least, so much as is more than the yearly rent of the land: but if the husband and wife were joint-tenants of the land, she shall have the corn and not his executors^a. And if a parson sows his glebe land, and dies before severance, and after his successor is admitted, instituted, and inducted, before the corn is cut, it shall go to the executors or administrators of the deceased, who must pay tithes thereof to the successor^b.

THINGS that are affixed to the tenement, and are made parcel of the freehold, belong to the heir, and not to the executor *or administrator*, as the glass annexed to the windows of the house, which is parcel of the house, and shall descend as parcel of the inheritance to the heir, and the executors *or administrators* shall not have it. And although the lessee himself, at his own cost, cause the glass to be put into the windows, yet the same being parcel of the house, he cannot take it away afterwards, without danger of punishment for waste. Neither is there any material difference in law, whether the glass was annexed to the window with nails, or in any other manner, either by the lord or by the tenant; for being once affixed to the freehold, the same cannot be removed by the lessee, but shall belong to the heir, and not to the executors *or administrators*^c. So in respect of wainscot, this being annexed unto the house, either by the lessor or by the lessee, is parcel of the house. And there is no difference whether it be affixed with great nails or little nails, or by screws or irons thrust through the posts or walls of the house; for howsoever it be affixed, either in manner

^a Law of Test. 342.

^b Swinb. 421.

^c 4 Burn's Eccles. Law, 243.

aforesaid,

aforesaid, or in any other manner, it is parcel of the freehold; and if the executors or administrators shall remove it, they are punishable for the same^q: and not only glass and wainscot, but any other such like thing affixed to the freehold, or to the ground, with mortar and stone; as tables dormant, leads, mangers, and such like; these also belong to the heir, and not to the executor or administrator^r. As do also millstones, anvils, doors, keys, window-shutters, none of these being chattels, but parcel of the freehold, or thereto pertaining, shall not go to the executors^s or administrators.

AN executor taking away a furnace which was set up in the middle of a house, and not fixed to any wall, the heir brought an action of trespass against him, and it was adjudged for the heir, that this should go as part of the freehold and inheritance of the heir. But in the case of *Day and Austin*, Walmsley said, that Lord Dyer's opinion was, that where the furnace is not affixed to the wall, the lessee might, within his term, take it away; but not if it was fixed to the wall, for there it would strengthen the house^t.—Pictures and glasses, though, generally speaking, not part of the freehold, yet if put up instead of wainscot, or where otherwise wainscot would have been put up, shall go to the heir; for the house ought not to come to the heir maimed or disfigured^u. But in the case of *Harvey and Harvey*, M. 14 Geo. II. in trover by the executor against the heir, it was held by chief justice Lee, that hangings, tapestry, and iron backs to chimneys, belonged to the executor; who recovered accordingly against the heir. And the law seems now to be held not so strict as formerly; and if these things can be taken away without prejudice to the fabric of the house, it seems that the executor or administrator shall have them; as

^q Swinb. 421.

^r *Ibid.*

^s Went. Off. Exec. 61.

^t Law of Test. 342.

^u *Ibid.*

tables, although fastened to the floor; furnaces, if not made part of the wall, grates, iron ovens, jacks, clock cases, and such like, although fixed to the freehold by nails or otherwise^v.

In the case of *Lawton and Lawton*, 1743, the question was, whether a fire-engine, set up for the benefit of a colliery by a tenant for life, shall be considered as personal estate, and go to the executor; or fixed to the freehold, and go to a remainder man^w. For the plaintiff (who was a creditor of the tenant for life) evidence was read, to prove that the fire-engine was worth, to be sold, 350*l*. and that it is customary to remove fire-engines. And it was urged, that the testator had died greatly in debt; and it would be hard, when he had been laying out his creditors money in erecting this engine, that they should not have the benefit of it, but that the strict rule of law should take place. And it was compared to the case of a cyder mill, which is let in very deep into the ground and is certainly fixed to the freehold; and yet lord chief baron Comyns, at the assizes at Worcester, upon an action of trover brought by the executor against the heir, was of opinion, that it was personal estate, and directed the jury to find for the executor. And lord chancellor Hardwicke, on the question of the fire-engine, whether it shall be considered as personal estate, and consequently applied to the increase of assets for payment of debts; says, it appears in evidence, that in its own nature it is a personal moveable chattel, taken either in part or in gross before it is put up. But then it is insisted, that fixing it, in order to make it work, is properly an annexation to the freehold. In the old cases they go a great way upon the annexation to the freehold; and so long ago as Henry the seventh's time, the courts of law construed even a copper and furnaces to be part of the freehold. Since that

^v 4 Burn's Eccles. Law, 244.

granteth lands to A for life, and after

^w Remainder man, is he who has the determination of A's estate for the estate by virtue of some limitation, life, limiteth it to B and his heirs for made either by will or deed. As if a ever. Here A is tenant for life, and man seised in fee-simple, deviseth or B a remainder man in fee.

time, the general grounds the courts have gone upon of relaxing this strict construction of law is, that it is for the benefit of the public, to encourage tenants for life to do what is advantageous to the estate during their term. What would have been held to be waste in Henry the seventh's time, as removing wainscot fixed only by screws, and marble chimney-pieces, is now allowed to be done. Coppers, and all sorts of brewing vessels, cannot possibly be used, without being as much fixed as fire-engines; and in brew-houses especially, pipes must be laid through the walls, and supported by walls; and yet, notwithstanding this, as they are laid for convenience of trade, landlords will not be allowed to retain them. The old rules of law have been relaxed chiefly between landlord and tenant, and not so frequently between an ancestor and heir at law, or tenant for life and remainder man. But even in these cases, it admits the consideration of public conveniency for determining the question; and after making some more observations on the case, lord Hardwicke says, Upon the whole, I think this fire-engine ought to be considered as part of the personal estate of Mr. Lawton, and go to the executor for increase of assets. And decreed accordingly^x.

THERE are some goods and personal chattels called heir-looms, which, contrary to the nature of chattels, shall go by special custom to the heir along with the inheritance, and not to the executor or administrator of the last proprietor; and these are generally such things as cannot be taken away without damaging or dismembering the freehold^y.—If a man be seised of a house, and possessed of divers heir-looms, that by custom have gone with the house from heir to heir; it seemeth that these, although no part of the freehold, shall go to the heir, and not to the executor^z; and that if a man deviseth these away by his will, this devise is void^a.—By special custom in some places, carriages, utensils, and other household implements, may be heir-looms; but such custom

^x 3 Atkyns, 13. ^y Burn's Eccles. Law, 247.

Law, 244.

^z 4 Burn's Eccles. Law, 247.

^a Co. Litt. 185.

^y Black. Com. 2 V. 427.

must be strictly proved ^b. — Other personal chattels there are, which descend to the heir in nature of heir-looms, as a monument or tombstone in a church, or the coat-armour of his ancestor there hung up, with the pennons and other ensigns of honour, suited to his degree. In this case, although the freehold of the church is in the parson, and these are annexed to that freehold, yet cannot the parson, or any other, take them away or deface them, without being liable to an action from the heir. Pews in the church are somewhat of the same nature, which may descend by custom immemorial (without any ecclesiastical concurrence) from the ancestor to the heir. But though the heir has a property in the monuments and escutcheons of his ancestors, yet he has none in their bodies or ashes; nor can he bring any civil action against such as indecently at least, if not impiously, violate and disturb their remains, when dead and buried. The parson, indeed, who has the freehold of the soil, may bring an action of trespass against such as dig or disturb it: and if any one, in taking up a dead body, steals the shroud or other apparel, it will be felony; for the property thereof remains in the executor, or whoever was at the charge of the funeral ^c.

CHARTERS and deeds, court-rolls, and other evidences of the land, together with the chests in which they are contained, shall pass together with the land to the heir, in the nature of heir-looms, and shall not go to the executor or administrator ^d. But as to the chests, *Rolle* makes a distinction, and saith, if the writings which concern the inheritance are in a chest, the executor shall have the chest, and the heir the writings. But if the chest be shut, the heir shall have the chest also; if it be not shut, the executor shall have the chest ^e. The author of the Law of Testaments observes, that this distinction seemeth not to be well

^b Black. Com. 2 V. 428.

^d *Ibid.*

^c *Ibid.*

^e 1 Roll's Abr. 915.

taken; for if it be a box intended for the keeping of the deeds, the heir ought to have it, whether locked or open: on the other hand, if it be a box designed for other use, as for keeping linen, it cannot be said to be appurtenant to evidences, although some be in it, for so may other things also; or perhaps it may be a chest or cabinet of great value, surely this shall not go to the heir, when perhaps there is not personal estate sufficient to pay the testator's debts^f.

BESIDES these things that are in the nature of heir-looms, there are some other goods and personal chattels that may not go to the executors or administrators; as, *paraphernalia*, which our law uses to signify the apparel and ornaments of the wife, suitable to her rank and degree; and which she becomes entitled to at the death of her husband, over and above her jointure or dower, and preferable to all other representatives: and the jewels of a peeress usually worn by her, have been held to be *paraphernalia*. And the husband cannot by will devise from his wife such ornaments and jewels; though during his life, perhaps, he hath the power (if unkindly inclined to exert it) to sell them or give them away. But if she continues in the use of them till his death, she shall afterwards retain them against his executors and administrators, and all other persons, except creditors, where there is a deficiency of assets. And her necessary apparel is protected even against the claim of creditors^g. But she shall not have excessive apparel; and if she takes more than is convenient, she shall be taken to be an executor of her own wrong. If the husband delivers his wife a piece of silk to make a garment, and dies, although it was not made into a garment in the life of the husband, yet the wife shall have it, and not the executors of the husband; but against the debtor of the husband, the wife shall have no more apparel

^f Law of Test, 343.

^g Black. Com, 2 V. 435.

than is convenient ^h.—Where the question to be decided was, whether *paraphernalia* should be liable to the payment of simple contract creditors and legacies, lord Hardwicke said, At Law, where the husband dies indebted, the widow cannot have her *paraphernalia*; but this court ⁱ does not determine so strictly; for, if the personal estate hath been exhausted in payment of specialty creditors ^k, she shall stand in their place, as to so much of the real assets ^l of the heir at law; for she has a prior right, and a superior one to legatees, who take only by the bounty of the testator ^m. So likewise, if the husband pledges the wife's *paraphernalia*, and dies, leaving a sufficient estate to redeem the pledge, and pay all his debts, she shall be entitled to have it redeemed out of the husband's personal estate.—But the husband may alienate the same in his lifetime ⁿ; that is, he may transfer the property to another. To alienate, or to alien, chiefly relates to lands or tenements, as to alien land in fee, is to sell the fee-simple thereof.

SECTION THE THIRD.

OF MAKING AN INVENTORY.

THE executor or administrator is to make an inventory of all the goods and chattels, whether in possession or action, of the deceased; which he is to deliver in to the ordinary upon oath, if thereunto lawfully required ^o. It is said, that if an executor, without making an inventory, shall interfere in the administration of the goods of the deceased, except in certain cases; such as the funeral expences, the necessary preservation of the goods, and the like, he shall be bound to answer to every one of his creditors his whole debt ^p. And that every legatary may recover

^h 1 Roll's Abr. 911.

ⁱ The Court of Chancery.

^k For what specialty creditors are, see pag. 55.

^l For what real assets are, see pag. 45.

^m Case of Snellson and Corbet, June 16, 1746. 3 Atk. 369.

ⁿ 3 Atk. 394.

^o Black. Corn. 2 V. 510.

^p Swinb, 228.

his whole legacy at his hands : for in this case the law presumeth, that there are sufficient goods to pay all the legacies, and that the executor doth secretly and fraudulently subtract the same. Whereas otherwise the executor is presumed not to have any more goods which were the testator's than are described in the inventory, the same being lawfully made^q. And therefore if any creditor or legatary affirms, that the testator had any more goods than are comprised in the inventory, he must prove the same : otherwise the judge is to give credit to the inventory, being made in due form of law^r. But as the time of exhibiting such inventory is left to the discretion of the ordinary, he may remit the making of it for a reasonable cause ; as, where it may be expedient that the quantity of goods should not be divulged^s.

By the constitution of Othobon, the inventory shall be made in the presence of some credible persons, who shall competently understand the value of the goods belonging to the deceased ; for it is not sufficient to make an inventory, unless the goods therein contained are particularly valued and appraised by some honest and skilful persons, according to their just value in their judgments and consciences ; being estimated according to such price as the same might be sold for at that time^t. —By the practice of the courts, if the goods of the deceased shall be appraised by any honest persons in the neighbourhood, and reduced into an inventory, and afterwards the inventory shall in due time be exhibited, before the judge who proves the will or grants administration, upon the oath of the executor or administrator ; such inventory shall receive credit in all causes and courts ; and he that exhibits it shall be freed from the burden of

^q Swinb. 228.^r *Ibid.* 426.^s Lind. 176.^t Swinb. 425.

proving the truth thereof, or that the testator had no more goods; but the legatee, or other persons preferring claims, are to prove that goods have been omitted therein".

SOMETIMES when there is a contest, it is demanded, and by the judge decreed, at the instance of the party having interest in the goods of the deceased, that an inventory be exhibited upon the oath of the executor or administrator, before the issuing of the probate or letters of administration under seal; and then, notwithstanding the former general "oath had been taken for the faithful execution of the will, or administering the goods of the deceased, and for exhibiting a true inventory, a special oath hath been used to be taken, at the time of exhibiting the inventory, of the truth thereof, and that either personally or by virtue of a commission. And sometimes before the granting, or at least before the issuing of the probate or letters of administration (instead of an inventory of the goods of the deceased upon the oath of the party), at the request of some person having interest, the judge issueth a commission for the appraisement and true valuation of the goods, rights, and credits, and inspection of the obligations, leases, and other writings and papers whatsoever, concerning the personal estate of the deceased, at the house of the deceased, or elsewhere, wheresoever his goods, rights, or credits remain or be, on such a day or days, with continuation and prorogation of the time and place, as shall be needful. Also in these cases, there usually issues a monition against the other party in special, and all others in general, with whom any of the goods, rights, or credits of the deceased remain and be, that they exhibit or shew, or cause to be exhibited or shewn, really and with effect, to the appraisers, by virtue of the com-

* 1 Oughton's Ordo Judiciorum, 344.

W Pag. 13.

mission aforesaid appointed, at the time and place of the execution thereof, the aforesaid goods, rights, and credits of the deceased, and also the bonds, leases, and other writings and papers concerning the personal estate of the deceased, remaining or being with them, or any of them, to the end that they may be appraised and put in the inventory, on pain of law and contempt.—Such commission being duly executed, the inventory is brought in and exhibited, signed by the hands of the commissioners or appraisers, or two of them at the least, without the oath of the party for the truth thereof. And also in such cases, an inventory is often required upon the oath of the executor or administrator, of such goods of the deceased as have been already disposed of^x.

AFTER the inventory is exhibited, a creditor shall not be admitted to object thereto in the ecclesiastical court; for the statute^y which requires the executors or administrators to make an inventory, only enjoins them to deliver it in upon oath into the keeping of the ordinary; and the ordinary, by the same statute, is required to receive the same so presented or tendered to be delivered.—The court of King's Bench being moved, to grant a prohibition to the ecclesiastical court, on behalf of Mrs. Catchside an administratrix. She having been cited into an inferior ecclesiastical court at the promotion of Ann Ovington, a creditor, to exhibit an inventory, which she accordingly brought in, and the creditor objected to it, and obtained a decree. The administratrix then appealed to the superior ecclesiastical court, which affirmed the decree. The suggestion on which the plea for a prohibition was built was, the want of jurisdiction of those courts. The reply to which, on shewing cause, was, that it being after sentence, it was now too late for a prohibition, unless it should appear that they had determined contrary to law. But lord

^x 1 Ought. 344, 5.

^y 21 Hen. VIII. c. 5.

Mansfield and the court were of opinion, that from the face of the proceedings, it appeared that the spiritual court had no jurisdiction, and therefore the rule for a prohibition was made absolute^z.

THE things that are to be put into the inventory, we may perceive by what has before been said, concerning the particulars the administrator is interested in, by virtue of his administration^a.—Debts owing to the deceased, of which there is no writing or obligation, it is said, ought not to be put into the inventory before they be received; because before that they are not found to be debts, at least so much as that they may be handled or taken hold of; but afterwards, when such debts are received, they ought to be put into the inventory as goods newly accruing^b. But unless they be bad debts, it seems best to insert them; and even if they be bad debts, or desperate, yet they may be inserted, specifying them as such. And if in the course of administration they shall be recovered, then they shall be accounted for in like manner as the rest of the personalty: and if they cannot be recovered, or so much of them as cannot be recovered, shall not be accounted for as any part of the goods of the deceased^c.—Debts, which the deceased owed to others, says Lindwood, ought not to be put in the inventory; because they are not the goods of the deceased, but of other persons. Yet they may be put in, if it shall seeme expedient^d.—If the inventory should never be required, yet the person who applies for an administration, should obtain knowledge of the value of the deceased's goods and chattels, that he may be prepared to take the oath before-mentioned.

By the statutes of the 5 W. & M. c. 20. and 9 W. c. 25. it is required, that the inventory be written or ingrossed on paper or parchment, having a double six-penny stamp; and by the statute of the 23 Geo. III.

^z Case of Catchside and Ovington,
T. 6 Geo. III. 1 Burr. 1922.

^a Pag. 23—37.

^b Lind. 176.

^c 4 Burn's Eccles. Law, 241.

^d Lind. 176.

42 *The DISPOSAL of a PERSON'S ESTATE*

c. 28. there is an additional duty of one shilling added there to ; so that now the inventory must be written or ingrossed on paper or parchment, stamped with a two shilling stamp.— It may be made in the following form, with variations, according to the condition of the goods to be inventoried.

A true and perfect inventory of all the goods, chattels, wares, and merchandizes, as well moveable as not moveable, of A. B. late of C. in the county of _____, in the diocese of _____, yeoman, deceased, made by us whose names are hereunto subscribed, the _____ day of _____ in the year of our lord

			£.	s.	d.
His purse and apparel,	_____	_____	15	0	0
Horses and furniture,	_____	_____	20	0	0
Horned cattle,	_____	_____	27	0	0
Sheep,	_____	_____	20	0	0
Swine,	_____	_____	0	13	0
Poultry,	_____	_____	0	3	4
Plate, and other household goods,	_____	_____	18	0	0
One lease of, &c.	_____	_____	30	0	0
Rent in arrear,	_____	_____	35	0	0
Corn growing at the time of his death,	_____	_____	12	0	0
Hay and corn,	_____	_____	10	0	0
Ploughs, and other implements of husbandry,	_____	_____	6	10	0
Debts,	_____	_____	100	0	0
Total,			294	6	4

Other debts supposed to be desperate, _____ 25 2 6
 Debts owing by the deceased, 250l.

Appraised by us the day and year above written,

D. E.

F. G.

SECTION THE FOURTH.

OF GETTING IN THE EFFECTS, AND WHAT SHALL
BE ASSETS IN THE ADMINISTRATOR'S
HANDS TO MAKE HIM CHARGEABLE,

FOR collecting the goods and chattels of the deceased, the executor or administrator has very large powers and interests conferred on him by the law, being the representative of the deceased. And an executor or administrator may, after the death of the deceased, enter into the house where the deceased lived, and where he died, and where the goods are, and take them away, and justify it; but he must do it within convenient and reasonable time, as within thirty days after his death, or thereabouts, and in a quiet and fair manner when the door is open^e. In the former part of this chapter we have seen, that administrators are put upon the same footing, with regard to suits, as executors appointed by will, and that they shall have actions to demand and recover, as executors, the debts due to the intestate. An administrator may have an action upon a judgment, statute, recognizance, obligation, or other specialty made to his intestate; or upon any covenant or contract; and he shall have an action of trespass or trover for the goods of the intestate taken in his life; and an action for a trespass with cattle in his close^f. And towards the beginning of this chapter we have seen, that for the most part the same actions the deceased might have had, the administrator shall have also, and that in actions arising by breach of promise and the like, where the right descends to the representatives of the plaintiff, and those of the defendant have assets to answer the demand, though the suits shall abate by the death of the parties, yet they may be revived against, or by the executors or administrators. Likewise we have seen, that administrators are empowered to distrain for rent in

^e Shep. Touch. 453.

^f Com. Dig. Administration (B. 13.)

†

arrear,

arrear. — Where any judgment after verdict shall be had, by or in the name of any executor or administrator; in such case an administrator of goods not administered, may sue forth a writ of *scire facias*, and take execution upon such judgment^g.

In all actions brought by executors or administrators, upon contracts, bonds, or other things made to the deceased, or for goods taken away in his life, they shall pay no costs by any statute^h. Executors and administrators, when suing in the right of the deceased, shall pay no costs: for the statute 23 Hen. VIII. c. 15, doth not give costs to defendants, unless where the action supposes the contract to be made with, or the wrong to be done to, the plaintiff himselfⁱ. And when an executor must declare as executor, he shall pay no costs: but if the cause of action arises in the time of the executor, and is therefore a matter within his knowledge, and for which he may declare in his own right, and need not declare as executor, he shall be liable to pay costs^k. — On a question, whether an executor should be permitted to discontinue, without payment of costs. For the plaintiff executor, it was urged, that an executor should not pay costs in any instance excepting one, viz. where he had brought an action as executor, which he might have brought in his own name: but the court were of opinion, that the giving an executor leave to discontinue, was matter of discretion in the court; and they ought not to give him such leave, in any case where he hath knowingly brought his action wrong, unless he will consent to pay costs^l. On a judgment of *non prosequitur*^m, for the executor's wilful delay he shall pay costsⁿ.

^g Stat. 17 Car. II. c. 8.

^h New Abr. tit. Costs.

ⁱ Black. Com. 3 V. 400.

^k Str. 682.

^l Bur. Mansf. 1451.

^m *Non prosequitur*, or, as it is usually termed, *non pros*, is where any person commences an action and does not declare, either the term the writ is returnable, or before the end of the ensuing term, the defendant against whom

the action is brought having appeared, may sign a *non pros* at any time in the vacation of such ensuing term, and not after. Attorney's Pract. Epit. 16. And the plaintiff for thus deserting his complaint in not pursuing his action, shall not only pay costs, but is liable to be amerced to the King. Black. Com. 3 V. 296.

ⁿ Bur. Mansf. 1584.

Assets are real, or personal; where a man has lands in fee-simple, and dies seised thereof, the lands which come to his heir are assets real; and where he dies possessed of any personal estate, the goods which come to the executors or administrators are assets personal. *Assets* are also divided into assets by descent and assets in hand. *Assets* by descent are where a person is bound in an obligation, and dies seised of lands which descend to the heir, and which lands shall be assets, and the heir shall be charged as far as the land to him descended will extend^o. *Assets* in hand are where one dies indebted, and appoints executors, or dies intestate, and the executor or administrator hath sufficient in goods or chattels, or other profits, to pay the debts, or some part thereof; this shall be said to be assets in his hands, and for so much he shall be charged^p. There is also another division of assets, into *legal* and *equitable* assets: *legal assets* are such as are liable by the course of law; *equitable assets* are such as are only liable by the help of a court of equity^q. As to real assets and assets by descent, which more immediately concern the heir, more will be said hereafter^r. We shall therefore proceed to consider what are assets in the administrator's hands to make him chargeable.

ALL those goods and chattels, actions and commodities, which belonged to the deceased in right of action or possession as his own, and so continued to the time of his death, and which after his death the executor or administrator gets into his hands, as duly appertaining to him in right of his executorship and administration, and all such things as come to the executor or administrator in lieu, or by reason of that, and nothing else, shall be said to be assets in the hands of the executor or administrator, to make him chargeable to a creditor or legatee^s.

ASSETS in the hands of one of the executors, shall be said to be assets in the hands of all the executors; and assets in any part of the world shall be said to be assets in every part of the

^o Terms of the Law.

^p Shep. Touch. 472.

^q See pag. 59.

^r Pag. 93, 94.

^s Shep. Touch. 472.

world : and therefore if that point be in issue, and it appear that there are assets in the hands of any one of the executors, or in any county or place whatsoever, the jury must find that there are assets ^t. And though a plantation be an inheritance, yet being in a foreign country, it is a chattel to pay debts, and a thing that is testamentary ^u. All goods and chattels, of what nature or kind soever that are valuable, as oxen, kine, corn, &c. shall be esteemed assets. But such things as are not valuable, as a presentation to a church, and the like, shall not be accounted assets ^w.

ALL the goods and chattels that come to the executor or administrator, in the right of their executorship or administration, and are by law given to them by virtue thereof, in the right of the deceased (as herein before particularised ^x), and which are in possession, shall be esteemed assets in his hands ; and goods pledged to the deceased, and not redeemed, or the money wherewith they are redeemed, shall be said to be assets in the hands of the executor or administrator ^y. And all the goods and chattels in action or possibility at the time of the death of the deceased, that are afterwards recovered, and of which the executor or administrator hath obtained possession ; when they are so recovered, are esteemed assets in his hands. But they are never accounted assets, until they are recovered and in possession ; therefore if there be debts owing to the deceased upon statutes or obligations, or otherwise, these are never esteemed assets in the hands of the executor or administrator, until they are recovered. So likewise though there be debt or damage, recovered by a judgment had by the deceased, until execution be made, this shall not be esteemed assets in the hands of the executor or administrator. So if the executor bring an action of trespass against another *de bonis asportatis in vita testatoris*, for goods carried away in the life of the testator, and he have a judgment

^t Shep. Touch. 472.

^u 2 Vent. 358.

^w Shep. Touch. 472.

^x Pag. 28—37.

^y Shep. Touch. 472.

for damages ; in this case, until he hath recovered by execution, it shall not be esteemed assets in his hands. And if the judgment be erroneous, and the execution avoidable ; in this case, although it be recovered and gotten in possession, yet it shall not be esteemed assets. And therefore, if one sue another, and recover against him as administrator of J. S. and after a testament made by J. S. is produced and proved, and thereby an executor is made ; in this case the money recovered by the administrator shall not be said to be assets in his hands as to any of the creditors, because the executor may recover it from him, or the debtor will have it again. And if the executor or administrator never recover, or get the thing into his possession, he shall never be charged, especially where he has done his best to get it, and cannot.

If one covenant to make a lease for years to the deceased, his executors or administrators, and after his death the lease is made to the executor or administrator accordingly ; in this case, this lease shall be said to be assets in his hands, and he shall be chargeable for so much to any creditor ^a. And if an executor renew, he shall account for the new lease as well as the old, for the benefit of the creditors ^a. And whatsoever the executor or administrator must be forced to sue for by the name of executor or administrator, being recovered, shall be esteemed assets in his hands ^b. And if an executor recovers (as executor) things in chancery by equity, these things recovered shall be assets ^c.

ALTHOUGH the thing be extinct and gone as to the executor and administrator himself, yet it may have its being, and be accounted assets as to creditors and legatees. And therefore, if an executor or administrator have a lease for years of land, in the right of the deceased, and afterwards he purchases the fee-simple of the land (whereby the lease is drowned), yet in this case the lease shall continue to be assets as to creditors and legatees ^d. And if an executor surrenders a term of years which he had as executor to him in reversion, it is not extinct as to him, but shall still remain assets in the executor to satisfy debts and legacies ^e. And if the debtee make the debtor his executor, or the debtee die intestate, and the administration is committed to the debtor ;

^a Shep. Touch. 473.

^a 2 Chas. Ca. 208.

^b Shep. Touch. 473.

^c 1 Roll's Abr. 920.

^d Shep. Touch. 474.

^e 1 Co. Rep. 87.

in these cases the debt shall be said to continue, and shall be esteemed, assets for so much as to other creditors ^f. Yet, if there be sufficient assets to pay the testator's debts, the debtor being made executor is thereby discharged of the debt ^g.

THE goods and chattels of other men in the hands of the executor or administrator, that were in the possession of the deceased, if he had no right to them, or if he had, and they do not belong to the executor, will not make the executor or administrator chargeable; for these shall not be esteemed assets in his hands. And therefore, if the goods of another man be amongst the goods of the deceased, and these come together into the hands of the executor or administrator; these goods that are the goods of another shall not be said to be assets in the hands of the executor or administrator. And if the executor receive a rent that belongs to the heir, this rent shall not be said to be assets in his hands: and hence it is, that if the deceased were outlawed at the time of his death, his goods and chattels are not to be accounted assets, for they are none of his ^h.

A release of a certain debt due to the testator makes it assets in the executors hands, because it shall be intended he would not have made the release unless the money had been paid to him ⁱ. And if an executor puts in suit a bond of 100l. for performance of covenants, and the parties submit to an award, and it is awarded that the obligor shall pay 70l. in full satisfaction, and that the executor shall release, which is done accordingly; it seems, that the executor shall be taken to have assets to the value of the whole 100l. for though by the award he was compelled to release, it was his own act to submit to the arbitrament ^k.

If a man hath a lease for years worth 20l. *per annum* at the rent of 5l. and he die; in this case not the whole value of the land, but so much as is above the rent, shall be said to be assets in the hands of the executor or administrator ^l. As where an executor has a lease for years of the value of

^f Shep. Touch. 474.

^g Black. Com. 2 V. 512.

^h Shep. Touch. 474.

ⁱ 1 Nelf. Abr. 262.

^k 3 Leon. 53.

^l Shep. Touch. 474.

20l. a year, rendering rent of 10l. a year; it is assets in his hands only for 10l. over and above the rent^m. By the statute of the 14 Geo. II. c. 20. before-mentionedⁿ, it is enacted, that estates *pur auter vie*, in case there be no special occupant^o thereof, of which no devise shall have been made according to the statute of the 29 Car. II. c. 3. or so much thereof as shall not have been so devised, shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate. And by this statute of Car. II. an estate *per auter vie* shall be assets in the hands of the heir, if he has it as special occupant.

If there is a mortgage for years (whatever be the number), this is assets at law; because the whole interest is not gone from the mortgagor, the reversion in fee being left in him: but if it is a mortgage in fee, it is only assets in equity, because the legal estate is gone out of the mortgagor^p. If the heir of the mortgagee forecloses the mortgagor, yet the land shall go to the executor, unless the heir pays him the mortgage money; and then he may have the benefit of the mortgage^q. When upon a mortgage, money is made payable to the heir or executor, in that case, before or at the day of payment, the mortgagor hath election to pay it to either; but after the day of payment is past, and the mortgage forfeited by law, though equity doth give the mortgagor relief, so as upon the payment of the money, he shall have his land, yet equity will not revive the election of the mortgagor to pay it to the heir or executor; but then he shall be forced to pay it to the executor, because it came out of the personal estate of the testator, and thither it shall return. But if in the mortgage neither heir nor executor is mentioned, then, after the death of the mortgagee, the law determines it to be paid to the executor^r.

THE interest which a master hath in a servant is not assets in the hands of an executor; for a servant whose master is dead, is legally discharged, and is not servant either to the heir or executor^s. But the interest which one hath in an appren-

^m Cro. Eliz. 712.

ⁿ Pag. 30.

^o A special occupant is, where an estate for life is made to a man and his heirs; in such case the heir shall have the estate, after the decease of his ancestor, as special occupant, or as a per-

son particularly described, to whom the estate shall go after the lessee's death.

⁴ Burn's Ecclef. Law, 60.

^p 4 Burn's Ecclef. Law, 276.

^q 2 Vern. 67.

^r 2 Freem. 20.

^s Want. 55.

tice, is a chattel personal, and shall go to the executors^t, of which we shall see more hereafter^u. Also the interest in the liberty of a prisoner in execution for debt, is a chattel personal, and shall go to the executors^w.

HAVING seen, in the former part of this section, that the administrator has very large powers conferred on him by the law, here we may observe, that all acts done by him, as long as the administration continues in force, are good, and even though it be afterwards revoked or repealed. But there is a difference taken (6 Co. 18.) when an administration is repealed upon a citation, or upon an appeal. If it is upon an appeal, which suspends the administration, all acts after such suspension are void: if it is repealed upon a citation, all the acts of the administrator, till the repeal, are good; for by the citation the grant of the administration is not suspended; therefore, if the administration be repealed, all acts done by an administrator, which a rightful administrator might have done, shall be allowed, for in them he acted in the place of a rightful administrator^x. But if there is any fraud, a creditor may have relief upon the statute of the 13 Eliz. c. 5.^y—As it hath often been the case to the defrauding of creditors, that such persons were to have the administration of the goods of others dying intestate committed unto them, if they required it, would not accept the same, but suffered or procured the administration to be granted to some stranger of mean estate, and not of kin to the intestate; from whom themselves, or others by their means, took deeds of gift, and authorities by letters of attorney, whereby they obtained the state of the intestate into their hands, and yet stood not subject to any debts by him owing; it is enacted by the statute of the 43 Eliz. c. 8. That every person who shall obtain any goods or debts of any person dying intestate, upon any fraud as is above-mentioned, or without such valuable considerations as shall amount to the value of the same goods or debts, or thereabouts (except it be in satisfaction of some just and principal debt of the value of the same goods or debts to him owing by

^t Went. 55.

^u Pag. 58.

^w Law of Test. 30

^x Comyns, 150.

^y 6 Co. Rep. 19.

the intestate), shall be charged as executor of his own wrong, so far as such goods and debts will satisfy.

If a stranger takes upon him to act as executor, without any just authority (as by intermeddling with the goods of the deceased, and many other transactions), he is called in law executor of his own wrong, *de son tort*, and is liable to all the trouble of an executorship, without any of the profits or advantages: but merely doing acts of necessity or humanity, as locking up the goods, or burying the corpse of the deceased, will not amount to such an intermeddling, as will charge a man as executor of his own wrong. Such an one cannot bring an action himself in right of the deceased, but actions may be brought against him. He is chargeable with the debts of the deceased so far as assets come to his hands; and, as against creditors in general, shall be allowed all payments made to any other creditor in the same or a superior degree, himself only excepted. And though, as against the rightful executor or administrator, he cannot plead such payment, yet it shall be allowed him in mitigation of damages; unless, perhaps, upon a deficiency of assets, whereby the rightful executor may be prevented from satisfying his own debt^a.

—As the executor of his own wrong is liable to the suit of the rightful executor, creditors, or legatees; so also, in case of his death, are his executors or administrators liable, by the statute of the 30 Car. II. c. 7. although in other cases a personal wrong dies with him that did it^a.

SECTION THE FIFTH.

THE ADMINISTRATOR'S OFFICE AND DUTY IN PAYING DEBTS.

IN payment of debts the executor or administrator must observe the rules of priority; otherwise, on deficiency of assets, if he pays those of a lower degree first, he must answer those of a higher out of his own estate^b. And as to debts of equal degree he may, as we have before seen, retain what is due to himself^c.

FIRST, The executor or administrator may pay all funeral charges, and the expence of taking the letters of administration^d. But as to funeral charges it is said, that, in strictness,

^a Black, Com. 2 V. 507.

^b 4 Burn's Ecclef. Law, 191.

^c Black, Com. 2 V. 511.

^c Pag. 27.

^d Black, Com. 2 V. 511.

no funeral expences are allowed against a creditor, except for the coffin, ringing the bell, parson, clerk, and bearers fees; and not for pall or ornaments^e. And in general it is said, that no more than forty shillings for funeral expences shall be allowed against creditors^f.

SECONDLY, Debts due to the King on record or specialty, are to be paid^g. But this must be understood of such debts as are due to the King only by matter of record or specialty, and not of sums of money due to the King upon wood sales, or sales of his minerals, for which no obligation is given; or for amercements in his courts baron or courts of his honours, which be not courts of record; or for fines of copyhold estates there; or of forfeitures to the crown of debts by contract due to any subject by outlawry or attainder, until office thereupon found^h.

THIRDLY, Such debts are to be paid, as are by particular statutes to be preferred to all others; as by statute 30 Car. II. c. 3. are the forfeitures for not burying in woollen; and as by statute 17 Geo. II. c. 38. is the money due from overseers on poors rates; and by statute 9 Ann. c. 10. the money due for letters at the post-officeⁱ. As to the forfeitures for not burying in woollen, these by the statute 30 Car. II. c. 3. sect. 4. shall be paid out of the estate of the person deceased, before any statute, judgment, debt, legacy, or other duty whatsoever. And as to money due from overseers, by the statute of 17 Geo. II. c. 38. sect. 3. if any overseer of the poor shall die, his executors or administrators shall, within forty days after his decease, pay out of the assets all money remaining due, which he received by virtue of his office, before any of his other debts are paid. And as to money due for letters to the post-office, by the statute 9 Ann. c. 10. sect. 30. this shall be preferable in payment before any debt due to any private person.

FOURTHLY, Debts of record are to be paid, as judgments (docketted according to the statutes 4 & 5 W. & M. c. 20.), statutes and recognizances.—A debt of record is a sum of money which appears to be due by the evidence of a court of record; as, when any specific sum is adjudged to be due from the defendant to the plaintiff, on an action or suit at law. This is a contract of the highest nature, being established by the sentence of a court of judi-

^e 1 Salk. 196.

^f 3 Atk. 249.

^g Black. Com. 2 V. 511.

^h 2 New Abr. 432. Com. Dig. Administration (C).

ⁱ Black. Com. 2 V. 511.

cature. Recognizances also are a sum of money recognized or acknowledged to be due to the Crown or a subject, in the presence of some court or magistrate, with a condition that such acknowledgment shall be void upon the appearance of the party, his good behaviour, or the like : and these, together with the statutes merchant and staple, &c. if forfeited by non-performance of the condition, are also ranked among the last principal class of debts, viz. debts of record ; since the contract on which they are founded is witnessed by the highest kind of evidence, viz. by matter of record ^k.—As to judgments, they are not only those had against the deceased in his lifetime, but also debts upon judgments (although by mere confession, and without defence), had against the executors or administrators for the debts of the deceased ^l. And of two judgments, he who first sues execution must be preferred ; but before, it is at the election of the executor or administrator to pay which he pleases first ^m. It is not necessary, that the judgment be limited to the courts at Westminster ; but if it be obtained in any court of record, which hath power to hold plea by charter or prescription of debt above 40s. it is sufficient. For though upon such a judgment execution cannot there be had, but of such goods as are within the jurisdiction of that court ; yet, if the record be removed into chancery by a *certiorari*, and there by *mittimus* into one of the benches, then execution may be had upon any goods in any county of England ⁿ. But a judgment not docketted, according to the statutes 4 & 5 W. & M. c. 20. shall not affect any lands as to purchasers or mortgagees ; or have any preference against heirs, executors, or administrators, in the administration of the estates of their ancestors, testators or intestates. Which statutes, in order to render more easy the finding of such judgment entered, direct in what manner alphabetical lists shall be made of judgments by confession, *non sum informatus*, or *nihil dicit*, in any of the courts of record at Westminster ; to the respective offices of which any person may resort and search, on paying 4d. for every term's search.

^k Black. Com. 2 V. 465. 511.

^l Law of Exec. 39.

^m Treat. of Eq. 112.

ⁿ Swinb. 2. 456.

IT was decreed in the exchequer, that creditors by judgment at law, and creditors by decree in equity, shall be paid equally without any preference^o. And it is now become the established doctrine, that a decree of the court of chancery is equal to a judgment in a court of law; and where an executrix, whose testator was greatly indebted to divers persons, in debts of different natures, being sued in chancery by some of them, appeared and answered immediately, admitting their demands (some of the plaintiffs being her own daughters); other of the creditors sued the executrix at law, where the decree not being pleadable, they obtained judgments; yet the decree of the court of chancery, being for a just debt, and having real priority in point of time, not by fiction and relation to the first day of term, was preferred in the order of payment to the judgments, and the executrix protected and indemnified in paying a due obedience to such decree, and all proceedings against her at law stayed by injunction. This being first decreed by the master of the rolls, was affirmed by lord Talbot, and his lordship's decree was affirmed in parliament^p.—As to statutes, and recognizances, before mentioned, these standing in equal degree, it is at the administrator's election, to give precedency to which he pleases^q. But those which are forfeited shall be preferred before those which are for the performance of covenants not broken^r. And neither between one statute and another, doth the time of antiquity give any advantage as touching the goods of the conusor, but he who first seisseth them by execution is preferred; and before suing of execution, the executor may give precedency to either^s.

MORTGAGES may also be reckoned among this last mentioned class of debts; for where a man mortgages land, and covenants to pay the money, and dies, the personal estate of the mortgagor shall, in favour of the heir, be applied to exonerate the mortgage^t. And though there be no covenant in the deed for the payment of the mortgage money, yet the personal estate shall be liable in the hands of the executor^u. A mortgage is a charge upon the personal estate, as well as upon the lands mortgaged; and the personal estate is primarily liable: for a mortgage is a general debt, and the land is only

^o Bunb. 48.

^p In May 1737. 3 P. Will. 402.
Cas. Talb. 217.

^q 3 New Abr. 434.

^r Swinb. a. 457.

^s *Ibid.*

^t 2 Salk. 449.

^u *Ibid.* 1 Vern. 436.

as security^w. It was decreed at the rolls, that mortgages were to be paid before judgments and recognizances: but upon an appeal to the house of lords, it was adjudged, that mortgages are not to be preferred to other real incumbrances; but that mortgages, statutes, and recognizances, shall take place according to their priority, and as they stand in order of time^x.

FIFTHLY, Debts by specialty, or special contract are to be paid. When a sum of money becomes, or is acknowledged to be due, by deed or special instrument under seal; such as by deed of covenant, by deed of sale, by lease reserving rent, or by bond or obligation; it is considered as a debt by specialty; and such debts are looked upon as the next class after those of record, being confirmed by special evidence under seal^y. And rent arrear, and unpaid by the intestate, is equal to a debt by specialty; for this favouring of the realty, the administrator can no more wage his law^z against such a debt, than he can to a debt by specialty^a. Where an action of debt was brought against an executor, for rent reserved on a parol lease, after the lease was determined, and the executor pleaded that the testator entered into an obligation, and that he had not assets above 5*l.* which were not sufficient to discharge this obligation; on demurrer it was resolved, that this rent, though reserved on a parol lease, was yet equal to an obligation, and that it still remained in the realty, though the term was determined^b.

^w 1 Atk. 487.

^x Case of the Earl of Bristol and Hungerford. T. 1705. 2 Vern. 524.

^y Black. Com. 2 V. 465. 511.

^z *To wage law* is, where the defendant swears, that he does not owe the plaintiff any thing. This was more common formerly than it is now. It is now only in actions of debt upon simple contract, or for amercement, in actions of detinue, and of account, where the debt may have been paid, the goods restored, and the account balanced without any evidence of either, that the defendant is admitted to wage his law, and not where there is any specialty by bond or deed. And as the defendant is only allowed to wage his law in an

action of debt; at present, one shall hardly hear of an action of debt brought upon a simple contract, that being supplied by an action of trespass on the case, for the breach of a promise or assumpsit; and this being an action of trespass, no law can be waged therein. So that wager of law is now quite out of use, being avoided by the mode of bringing the action, but still it is not out of force. And therefore, when a new statute inflicts a penalty, and gives an action of debt for recovering it, it is usual to add, In which no wager of law shall be allowed. Black. Com. 3 V. 341.

^a 2 New Abr. 434.

^b *Ibid.*

As to a bond, any voluntary bond is good against an executor or administrator, unless some creditor be thereby deprived of his debt: but if the bond be merely voluntary, a real debt (though by simple contract only) shall have the preference. But if there be no debt at all, then a bond, however voluntary, must be paid by an executor^c. And although the executors are not named in an obligation, yet the law will charge them, for that they represent the estate of the testator. And the law is the same of administrators. But the heir shall not at any time be charged without express mention of the heir^d.

BEFORE we proceed to consider the last species of debts, viz. debts by simple contract, we may here make some observations on what has been said concerning debts of record, and debts by specialty, and special contract. As to debts of record, we may observe, that the executor ought to take notice of these at his peril^e. But as to debts due by bond, or other specialties, although the law requires, that debts should be paid according to their superiority, as herein set forth; yet, an executor may pay a debt on a simple contract before a specialty, if he hath no notice of such specialty; for otherwise it might be in the power of the obligee to ruin the executor by keeping his bond in his pocket, until the executor shall have paid away all the assets, in discharging simple contract debts^f. Respecting obligations, if there be divers of the like kind, it seemeth to be in the power of the executor to discharge which obligation, and to gratify which of the creditors he thinks fit: (in like manner as was before said respecting debts of record^g), which being done, the other creditors are without remedy, if there be no assets; unless the day of payment in the one obligation is expired, and the day of payment in the other obligation is not yet come; in which case, the former obligation is to be first satisfied; or unless there be suit commenced for some obligation, for then it is not in the power of the executor to discharge another obligation for which no

^c 3 P. Will. 222. Comyns, 255.

^d Dyer, 23.

^e 2 New Abr. 435.

^f 2 New Abr. 435.

^g Pag. 54.

action is brought, in prejudice of the former suit. But an executor may confess judgment on one obligation, and plead that judgment to an action brought on another obligation. And if there be two obligations, and the two several creditors bring several actions against the executor, he that first obtains judgment must be first satisfied ^h.

DEBTS upon judgments, recognizances, mortgages, bonds, and other like specialties, shall carry interest : so interest hath also been allowed upon demands due by covenant, although it was objected that they were not liquidated, and only found in damages ⁱ.—Interest of an annuity being decreed by the lord chancellor from the very day it became due, Mr. Peer Williams adds a query as to this, and says, it seems the arrears should carry interest only from the first day of payment next after the arrears of the annuity became due ; if payable half yearly, then from the next half-year day ; if quarterly, then from the next quarter day ; and so has been the common rule in these cases ^k.—Where a man prays satisfaction for a simple contract debt, merely out of personal assets, a court of equity will of course direct the debt to be paid with interest, to be computed from one year after the testator's death ^l.

DEBTS by simple contract, which are the last species of debts to be paid, are such where the contract upon the obligation arises, is neither ascertained by matter of record, nor yet by deed or special instrument, but by mere oral evidence, the most simple of any ; or by notes unsealed, which are capable of more easy proof, and therefore are only better than a verbal promise ; and this last species of debts may be branched out into a variety of obligations through the numerous contracts for money, which are not only expressed by the parties, but virtually implied in law ^m. Debts by simple contract, though postponed to all others, an executor *or* administrator is bound to pay, as far as he hath assets ⁿ. Yet if

^h 2 New Abr. 434. Swinb. 457,

ⁱ Barnard. 229.

458.

^m Black. Com. 2 V. 466, 511.

^j 14 Vin. Abr. tit. Interest,

ⁿ 2 New Abr. 434.

^k 1 P. Will, 541.

no suit is commenced against him, he may pay one creditor in equal degree his whole debt, though he has nothing left for the rest: for without a suit commenced, the executor has no legal notice of the debt^o. And no action shall be brought whereby to charge an executor or administrator, upon any special promise, to answer damages out of his own estate; unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized^p.

As to the interest a man hath in an apprentice, which, as we have seen, is a personal chattel, and will go to the executor^q; it was held by Holt, chief justice, that by the custom of London, the executor of the master should put the apprentice to another master of the same trade; and that in other places, it would be very hard to construe the death of the master to be a discharge of the covenants; though he admitted that the covenant for instruction had been considered as cancelled, but that he still continued an apprentice with the executor as to maintenance^r. And where an action was brought against the executor, upon the covenant of the testator to teach an apprentice his trade; and after verdict for the plaintiff, it was moved, in arrest of judgment, that this covenant was personal to the testator, and did not oblige the executors, but only obliged the master during his life to teach the apprentice, the court was of opinion, that it obliged the executors also, and that they ought to see the apprentice taught his trade; and if they were not of the trade, they ought to assign him to another that is of the trade, so that he may be taught according to the covenant; and judgment was given for the plaintiff^s. And where a master received with an apprentice 250*l*. and died within two years, the apprentice during that time having been employed only in inferior affairs, it was decreed, after debts on specialties

^o Black. Com. 2 V. 512.

^p Stat. 29 Car. II. c. 3. sect. 4.

^q Pag. 50.

^r 1 Salk. 66.

^s Case of Walker and Hall. T.

17 C. II. 1 Lev. 177.

were paid, that the executors should repay 250l. as a debt due on simple contract, deducting after the rate of 20l. a year for the maintenance of the apprentice, during the time he lived with his master ^t.

IN respect to legal and equitable assets; if a man possessed of a term for years, mortgages it, and dies, leaving debts, some by bond, and some by simple contract, the equity of redemption is equitable assets, and shall be liable to all the debts equally ^u. — A lease for years, or a bond, or grant of an annuity taken in a trustee's name, being personal assets, shall be applied in course of administration ^w; that is, as has been shewn. The distinction seems to be this: where there are legal assets, that is, assets which are liable at law without the help of equity, there the executor may apply them, according to the course of law, which allows and requires, a preference to be made as hath been mentioned; but where there are only equitable assets, that is, assets which are not liable, without the help of a court of equity, in such case, the court will direct the application thereof, according to that course which seems most equitable and just, that is, to pay every creditor his share in proportion ^x. So where the assets are partly legal, and partly equitable, although equity cannot take away the legal preference on legal assets, yet where one creditor has been partly paid out of such legal assets, when satisfaction comes to be made out of equitable assets, the court will postpone him till there is an equality, in satisfaction to all the other creditors out of the equitable assets, proportionable to so much as the legal creditor has been satisfied out of the legal assets ^y.

BUT now to return to the subject of paying debts with legal assets in such manner as the law requires. If one that hath a debt due to him from the deceased upon a simple contract, or the like, sue the executor or administrator for it, and there be debts due to others upon bonds and specialties, unsatisfied; in this case, the executor or administrator may not pay this debt, nor may he suffer the plaintiff to recover in his action; for if

^t Case of Scam against Bowden and Eyles, in the court of Chancery, M. 30 Geo II. Ch. Ca. Finch. 396.

^u 3 P. Will. 341.

^w 2 Vern. 764.

^x 4 Burn's Eccles. Law, 297.

^y *Ibid*.

he doth, and he hath not assets besides to satisfy the debts due upon bonds and specialties, he must satisfy so much out of his own estate, as he hath so paid, or suffered to be recovered from him; for in the case of an action brought, he is to plead and to set forth these debts upon specialties, and to say that he hath no more than what is sufficient to satisfy them; and thereby he shall bar the plaintiff in his action. In like manner it is, if one that hath a debt due to him from the deceased upon an obligation, sue the executor or administrator thereupon, and there be debts due to others upon judgments, statutes, or recognizances, and the executor or administrator suffer the plaintiff to recover the debt due upon the obligation, for want of pleading the judgments, &c. in this case he must pay so much out of his own estate, towards the satisfaction of the said debts due upon judgments, &c. as he hath paid of the debt due upon the obligation. But here it must be observed, that no judgment or statute that is discharged, or is left and suffered to lie by agreement to bar others of their debts, shall be any bar to others that sue for their due debts upon obligations, &c. and therefore if any executor or administrator shall plead such judgments, &c. in bar of any other debt sued for by any other creditor, the creditor may, by special pleading, set forth this matter of covin, and avoid the plea and bar of the executor or administrator².

IN an action of debt against an executor, if the defendant plead fully administered, and any assets be found in his hands, although there be not to the value of the debt; yet the plaintiff shall have judgment for his whole debt of the goods of the testator^a. But if it be found, that he had nothing in his hands; the judgment shall be, that the plaintiff shall take nothing by the writ, and shall not have judgment of the debt: for he hath waved this advantage by taking of the issue, and judgment is to be given upon the verdict^b. — Where a testator is much indebted, and the executor is desirous to be rid of the assets, his safest way is, to file a bill in chancery against the creditors, to the end they may, if they think fit, contest each other's debts, and dispute who ought to be preferred in payment^c.

² Shep. Touch. 457.

^a Roll's Abr. 929.

^b *Ibid*.

^c 2 Vern. 37.

SECTION THE SIXTH.

OF ACCOUNTING BEFORE THE ORDINARY.

BY the statute of the 22 & 23 Car. II. c. 10. the ordinaries shall and may proceed and call administrators to account, for and touching the goods of any person dying intestate, and upon hearing and due consideration thereof, order and make just and equal distribution of what remains clear (after all debts, funerals, and just expences, of every sort, are allowed and deducted); and the same distributions decree and settle, and compel such administrators to observe and pay the same, by the due course of his majesty's ecclesiastical laws: saving to every one, supposing himself or selves aggrieved, their right of appeal, as has been always in such cases used. But by the statute of the 1 Jac. II. c. 17. sect. 6. as before mentioned^d, it is provided, that no administrator shall be cited according to the said act of the 22 & 23 Car. II. c. 10. to render an account of the personal estate of his intestate (otherwise than by an inventory or inventories thereof), unless it be at the instance or prosecution of some person in behalf of a minor, or having a demand out of such personal estate as a creditor or next of kin, nor be compellable to account before any the ordinaries or judges, by the said act impowered and appointed to take the same, otherwise than as is aforesaid; any thing in the said act to the contrary notwithstanding. — The account must be passed before the same judge, or his surrogate or successor, that grants the administration.

If any person having interest shall call the administrator to exhibit, a true, full, and perfect inventory of the goods of the deceased which have come to his hands, and to give an account of his administration thereof; he who is called in such case, is bound personally to exhibit such inventory and account, and (if the adverse party demand it) to take a corporal oath of the truth thereof^e. And as proofs made upon the account, at the instance of some one or more persons having

^d Pag. 15.

^e Oughton's Ordo. Jud. 345.

interest,

interest, do not bind others who are not parties to the suit; therefore, to prevent multiplicity of actions, it behoves the administrator, when he is cited by any one of the parties to render an account, to cite the next of kindred in special, and all others in general, having or pretending to have interest in the goods of the deceased to be present, if they think fit, at the rendering and passing the account. And then upon their appearance, or contempt in not appearing, the judge will proceed to give sentence; and the account thus determined will be final^f.

AN executor or administrator shall be allowed all reasonable expences, as well in law-suits, as for other honest purposes: And this reasonableness of expences to be such, as that he may receive thereby neither profit or loss^g. And therefore he shall be allowed his expences in secular courts, over and above such costs as were allowed there^h.

IN an action of debt upon a bond entered into by an administrator to the ordinary, upon taking letters of administration, the question was, Whether an administrator, by virtue of this obligation, was bound to go, and give in his account in the spiritual court without being cited? And by Holt, chief justice, who delivered the opinion of the court. 1. It appears by the statute of Edward III. that an executor was compellable to account before the ordinary, and so was an administrator: but that the ordinary was to take the account as given in, and could not oblige them to prove the items of it, nor swear to the truth of them. So it was if a creditor sued in the ecclesiastical court; for he had a proper remedy at common law. But if a legatee had sued for an account in the ecclesiastical court, the defendant before the statute was compellable to prove the whole account; for the legatee had no other remedy, and the ecclesiastical court, which had a jurisdiction of legacies, could not otherwise do right: yet in such a case, if the executor would pay him, he could not sue farther, for he had right done him, and the executor was not liable, but of necessity that right might be

^f Oughton, 354.

^h Floyer's Proctor's Pract. 37.

^g Lind. 178.

done. 2. A person intitled to distribution on the 22 Car. II. is in consequence intitled to sue for an account as a legatee was; for the next of kin is a legatee by the statute, and as a statute legatee, shall have the same remedy as the other legatee might before the statute. The condition of an administration bond was, to account when required: therefore he was not to account before he was legally cited, which could not be *ex officio*¹; and therefore the statute of Jac. II. whereby the ordinary is prohibited from citing him in *ex officio*, had really no effect at all, for the law was so before: but since the statute of Car. II. the condition of administration bonds being, that he account at a day certain, he must account accordingly at his peril, and that without citation or suit; and this account must be in court; and if he comes at the day, and no court is held, he shall be excused; for he may plead he was there ready, and no court held. But then this account is not examinable, unless a party interested comes in and controverts it².

It is said the ordinary hath but a lame jurisdiction, and there being no negative words in the statute of Car. II. a bill for distribution properly lies in chancery¹. And where the surplus of the personal estate for want of distribution, by a will is distributable, there can be no suit for it in the spiritual court². — Where a man died intestate, and his widow took out letters of administration to him; the intestate's brother cited the widow into the spiritual court, to make distribution of her deceased husband's estate. The widow there suggests, that the brother had goods of the intestate in his hands to the value of 200l. And upon this the spiritual court orders him to bring the 200l. into court, to the end it may be distributed. And for not bringing it in, they excommunicate him. Upon which he moves in the King's Bench for a prohibition; and it was granted as to the whole process that compelled him to bring in the 200l. For by the court, the spiritual court hath power to make distribution of the estate, when it comes in, but not to fetch it in; because that is to hold plea of debt; but the spiritual court might refuse, in this case, to proceed to distribution, until the brother had brought in the 200l. but they cannot excommunicate him for not bringing it in³.

¹ Explained pag. 12.

² 2 Salk. 315.

³ 2 Ver. 362.

⁴ 5 Mod. 247. Str. 865.

⁵ Case of Clerke and Clerke, T. 10 W. L. Raym. 585.

C H A P. III.

Of Distribution.

SECTION THE FIRST.

WHAT THE ADMINISTRATOR IS TO OBSERVE
BEFORE HE MAKES DISTRIBUTION.

BY the statute of 22 & 23 Car. II. c. 10. whereby we have seen that ordinaries may call administrators to account, and order and compel them to make distribution^a, it is enacted, to the end that a due regard be had to creditors, that no such distribution of the goods of any person dying intestate be made, till after one year be fully expired after the intestate's death; and that such, and every one, to whom any distribution and share shall be allotted, shall give bond with sufficient sureties in the ecclesiastical courts, that if any debt or debts truly owing by the intestate, shall be afterwards sued for and recovered, or otherwise duly made to appear, that then, and in every such case, he or she shall respectively refund and pay back to the administrator, his or her rateable part of that debt or debts, and of the costs of suit and charges of the administrator, by reason of such debt, out of the part and share so as aforesaid allotted to him or her.

By the statute of the 19 Geo. III. c. 66. it is enacted, That after the first of June 1780, there shall be charged on every skin or piece of vellum or parchment, or sheet or piece of paper, upon which shall be ingrossed, written, or printed, any receipt or other discharge, for any legacy left by any will or other testamentary instrument, or for any share or part of a personal estate divided by force of the statute of distribution, or the custom of any province or place, the amount whereof shall not exceed the value of 20l. a stamp duty of 2s. 6d. And where the amount thereof shall be of the value of 20l.

^a Pag. 61.

and not amounting to 100l. a stamp duty of 5s. And where the amount shall be of the value of 100l. and upwards, a stamp duty of 20s. And that such receipt or other discharge shall be stamped before ingrossed, written, or printed; and if the same is not stamped as by this act is directed, or shall be stamped for a lower duty than as afore-said, no such receipt shall be pleaded, or given in evidence in any court, or admitted in any court to be good, useful, or available in law or equity. And by the statute of the 23 Geo. III. c. 58. it is enacted, that from the first of August 1783, the following additional duty shall be added to the above, viz. On every skin or piece of vellum or parchment, or sheet or piece of paper, on which shall be ingrossed, written, or printed, any receipt or other discharge, for any legacy left by will or other testamentary instrument, or for any share of a personal estate divided by force of the statute of distributions, or the custom of any province or place, the amount whereof shall not exceed the value of 20l. there shall be charged an additional stamp duty of 2s. 6d. And where the amount thereof shall exceed the value of 20l. and not amount to 100l. an additional stamp duty of 5s. And where the amount thereof shall be of the value of 100l. an additional stamp duty of 20s. and a like additional stamp duty upon every further sum of 100l. So by this latter act, the receipt or discharge, that by the former was to be on paper or parchment stamped with a 2s. 6d. stamp; must now be on paper or parchment stamped with a 5s. stamp. And where it was to be a 5s. stamp, it must now be a 10s. stamp. And where it was to be a 20s. stamp, it must now be a 40s. stamp. And if the legacy or personal estate amount to 200l. the receipt or discharge for the same must be on parchment or paper stamped with a 60s. stamp, and so for as many hundred pounds as there are more than 100l. there must be so many 20s. added to the first forty; as for example, suppose the legacy or personal estate, for which there is to be a receipt or discharge, should amount to 100l. then the paper or parchment on which it is to be written, printed, or ingrossed, must have thereon a 40s. stamp; if it amounts to 200l. a 60s. stamp; if it amount to 300l. an 80s. stamp; and so for as many hundred pounds as it amount to more than 300l. so many more 20s. must be added to the 80s.

BUT in this latter act is contained a proviso, that nothing therein contained shall extend to charge with the additional duties, by this act imposed, any legacy left by will or other testamentary instrument, or any share, or part of a personal estate, to be divided by force of the statute of distributions, or the custom of any province or place, which shall be left to the *wife, children, or grandchildren* of the person making such will, or shall be divided amongst them by force of the said statute or custom. So here it may be observed, that the wife, children, and grandchildren, are exempt from the duties to which others are liable by this act, but not from those of the former act, because, for any legacy or personal estate, the amount whereof shall not exceed the value of 20l. their receipt, or discharge, must be on paper or parchment, stamped with a 2s. 6d. stamp. And where the amount shall be of the value of 20l. and not to the amount of 100l. such receipt or discharge must be on paper or parchment, stamped with a 5s. stamp. And where the amount shall be of the value of 100l. *and upwards*; on paper or parchment, stamped with a 20s. stamp. By the words *and upwards*, we may observe the wife, children, and grandchildren are not liable to more than a stamp duty of 20s. if what they receive should amount to more hundreds of pounds than the first 100l. for, till this latter act took place, 20s. was the utmost duty required.

SECTION THE SECOND.
OF MAKING DISTRIBUTION.

BY the statute 22 & 23 Car. II. after debts and funeral expences are paid, the surplusage of intestates estates (except the estates of *femes covert*; that is, married women, to which their husbands have a right, as before mentioned ^b), shall, after the expiration of one full year from the death of the intestate, be distributed in the following manner: One third shall go to the widow of the intestate, and the residue in equal proportions to his children, or if the children be dead,

to their representatives, that is, their lineal descendants. But no child of the intestate (except his heir at law) on whom he settled in his lifetime any estate in lands, or pecuniary portion, equal to the distributive shares of the other children, shall have any part in the surplusage with their brothers and sisters; but if their estates, so given them by way of advancement, are not quite equivalent to the other shares, the children so advanced shall now have so much as will make them equal^c. But the heir at law shall have an equal part in the distribution with the other children, without any consideration of the value of the land, which he hath by descent, or otherwise, from the intestate.

By this statute the heir at law shall not abate, in respect of the land which he hath by descent, or otherwise, from the intestate; yet if he hath had any advancement from his father in his lifetime, otherwise than by land as aforesaid, he shall abate for the same in like manner as the other children. And so it seemeth that *coheiresses* shall bring together into hotchpot, such advancement (not being lands) as they shall respectively have received from their father, before they shall be intitled to recover their several distributive shares, agreeable to the general purport of the act, which is evidently to promote an equality as much as may be^d.

THIS word *hotchpot* is generally understood to signify mixing and blending together, and conveys much the same idea as the words *collatio bonorum*^e, which in the civil law is answerable to the word *hotchpot*, and signifies, that if a child advanced by the father, doth, after his father's decease, challenge a child's part with the rest, he must cast in all that he had formerly received, and then take out an equal share with the others^f.

IN respect to borough-english lands, which by custom descend to the youngest son, as we shall again see in the ensuing chapter^g; it became a point upon the statute of distribution, whether the youngest son (to whom the land de-

^c Black. Com. 2 V. 515, 516.

^d 4 Burn's Eccles. Law, 332.

^e Black. Com. 2 V. 190.

^f Jac. Dict. tit. Hotchpot, 10 edit.

^g Pag. 100.

scended by the custom of borough-english), should abate for these lands, or should be considered as an heir at law, who by the statute is to have a distributive share, without any allowance for lands by descent. And it was ruled by Sir Joseph Jekyll, master of the rolls, that he should allow for these lands^b. Yet where a man was possessed of a personal estate, and seised of a copyhold in fee, which was in the nature of borough-english, and the question was, whether the youngest son, upon whom the copyhold descended, should have an equal share with the other children of the personal estate, exclusive of the copyhold, or only so much as with that copyhold would make his portion equal to that of the other children. By lord chancellor Talbot. The heir at law is the eldest son, and not the heir in borough English; and the exception in the statute extends only to the eldest son. Yet nevertheless the youngest son, who is heir in borough-english, shall not bring the borough-english estate into hotch-pot; there being no law to oblige him to do this, but only this statute, and there are no words in the statute that require it: for the statute speaketh only of such estate as a child hath by settlement, or by advancement of the intestate in his lifetime. And it was decreed, that the youngest son should have an equal share with the other children, without regard to the value of the borough-english estate. And the former case coming after this before the lord chancellor Talbot, he reversed the decree of the master of the rolls, and decreed agreeable to this latter caseⁱ.

IN respect to what shall be an advancement, so as to come within the meaning of the statute, we may observe, it hath been determined, that small inconsiderable sums, occasionally given to a child, cannot be deemed an advancement or part thereof. Thus maintenance money, or allowance made by the father to his son at the university, or in travelling, or the like, is not to be taken as any part of his advancement, this being only his education;

^b Str. 935.

ⁱ Cas. Talb. 276.

and it would create charge and uncertainty, to enquire minutely into such matters. So, putting out a child apprentice, is no part of his advancement; for it is only procuring the master to keep him for seven years instead of the parent. But the father's buying an office for the son, though but at will, as a gentleman pensioner's place, or a commission in the army, these are advancements *pro tanto*, that is, for so much^k. And a provision made by a marriage settlement, although it is in the nature of a purchase^l, is such an advancement as that a child claiming a distributive share, shall first bring the said advancement into hotchpot. As where the father, on his son's marriage, covenanted, in case of a second marriage, to pay the first son by the first wife 500l. There was a son, and several other children of the first marriage. The father of these children died intestate; and by the court it was agreed, that the heir must bring the 500l. into the hotchpot, although in nature of a purchaser under a marriage settlement^m. So where a man on his marriage entered into articles, in consideration of the marriage, and of 4000l. portion, to settle an estate to raise portions for daughters, in case there were no sons; that is to say, if but one daughter the sum of 5000l. if two or more then the sum of 6000l. equally amongst them, to be paid at their respective ages of 18 years, or days of marriage, which should first happen; and 80l. a year maintenance in the mean time to each daughter. The marriage took effect; and they had issue one daughter only, and no son. Then the wife dies. Afterwards the man marries a second wife, and had by her a son and a daughter, and died intestate, leaving a personal estate to the amount of 20,000l. The daughter by his first wife, at that time, was about 12 years of age; and sometime after married one Mr. Edwards: and they brought their bill, to have an account of the personal estate of the wife's father, and their distributive share thereof. And the only question was, Whether the 5000l. should not

^k 3 P. Will. 317.

^l Purchase means any method of acquiring an estate otherwise than by descent. Black. Com. 1 V. 214. And where a person takes any thing from an

ancestor, or others by deed, will, or gift, and not as heir at law, this is a purchase. 2 Lill. Abr. 497.

^m 2 Vern. 638.

be looked upon to be so far an advancement of the plaintiff, the wife of Mr. Edwards, that if she would have any farther share of her father's personal estate, they must bring this 5000*l.* into hotchpot. And the court, consisting of King lord chancellor, assisted by Raymond chief justice, and the master of the rolls, and Price and Fortescue, justices, were all clear of opinion, that this was an advancement by the father in his life-time, within the meaning of the statute, though contingent and future, so that she could not have that and her distributive share likewise. And accordingly the decree was pronounced ⁿ.

IF the father settles a rent out of his lands upon a younger child, this is an advancement; so likewise if he by deed settles an annuity upon a child, to commence after his death, this is an advancement for so much: and by the same reason, a reversion settled on a child as it may be valued, is an advancement also ^o. And if a child who has received any advancement from his father, shall die in his father's life-time, leaving children; such children shall not be admitted to their father's distributive share, without bringing their father's advancement into hotchpot; as where a father had several children, and in his lifetime advanced one of them. The child, thus advanced in part, died in his father's lifetime, leaving issue. Afterwards the father died intestate, possessed of a considerable personal estate. It was ruled, that the issue of the dead child must bring into hotchpot what their father received in part of advancement, as he, if living, must have done; as that the issue stands in the place and stead of the father, claims under him, and cannot be in a better condition than the father, if living, would have been, and had claimed his distributive share ^p. — A child, partly advanced, shall bring in his advancement only amongst the other children; but the wife shall have no advantage of it ^q.

By what has been said, it may be perceived, that, where the intestate leaves a widow and children, or the representatives of children, one-third of his personal estate shall go to

ⁿ Case of Edwards and Freeman,

^p 4 Burn's Eccles. Law, 337.

¹ Abr. Eq. Caf. 249.

^q *Ibid.* 339.

^o 2 P. Will. 141, 442.

his widow, and the residue to his children; or if dead, to their representatives, that is, their lineal descendants, such of the children, or the representatives of such of them, as have been advanced as aforesaid, first bringing such advancement into hotchpot, in case they choose to claim their distributive share; and of such advancement, when the same shall be so brought into hotchpot, the widow shall have no advantage. Now we may consider how the residue of the intestate's estate is to go to his children, or if dead, to their representatives, that is, their lineal descendants. And here we may observe, the doctrine and limits of representation, as laid down in the statute of distributions, seem to have been principally borrowed from the civil law: whereby it will sometimes happen that personal estates are divided *per capita*, as when every claimant claims in his own right; and sometimes *per stirpes*, as when the claimants claim by representation, or in the right of another. They are divided *per capita* to every one an equal share, when all the claimants claim, in their own rights, as in equal degree of kindred, and not by representation in the right of another person^r. To make this sufficiently clear, let us first suppose that neither of the intestate's children hath died leaving children. 2. That the intestate's children are all dead, whether they were two, or three, or more, each of them having left children, as it may be one of them two, another three, or more. 3. That some of the intestate's children are living, and some dead, and that those who are dead have each left children.

As to the first supposition, it is sufficiently clear, that if neither of the intestate's children hath died leaving children, the residue as aforesaid, or the remaining two-thirds, after the wife has had her third, shall be equally divided between all the children of the intestate, as in this case they all claim in their own right; and where a man marries a woman, and hath issue by her, as it may be sons and daughters, and the wife dying, he marries another woman, by whom he hath also sons and daughters: now these, though they are called brothers and sisters, are but brothers and sisters of the half blood, because they had not both one father and mother^s; yet between

^r Black. Com. 2 V. 517.

^s Terms de Ley.

these no distinction is, or (as I conceive) ever was made; but in respect to collaterals^t, who may take where there are no lineal descendants, there are several precedents of judgments given since the statute, allowing the half blood to have but an half share; but now these are upon the same footing with the whole blood, in respect to what they are intitled to in the distribution of personal estate^u. Yet, in respect to real estate, the whole blood is always preferred, and the half blood is no blood inheritable by descent, as we shall see in the ensuing chapter^w. Where a father leaves behind him one or more children, and his widow should happen to be with child, the child in the mother's womb will be reckoned among the children of the deceased; and if the other children should proceed to a partition of the estate, it will be necessary to lay aside one share for the child that is to be born, and to name a curator to it, who may take care of its interest^x. But this provision is rendered more effectual by the statute, which, as we have seen^y, requires that no distribution shall be made till after the expiration of one year from the intestate's death, within which time the child will be born.

As to the second supposition, as that the intestate's children are all dead, whether they were two, or three, or more, each of them having left children, as it may be one of them two, another three, or more: in this case, where there be only grandchildren, their fathers or mothers respectively having died in the lifetime of their grandfather, the grandchildren take in their own right, and not by representation of their father or mother deceased; and the courts, where distributions are cognizable, will order an equal distribution to be made^z. And thus it would be, if there were only great-grandchildren of the intestate, both his children and grandchildren having all died before him.

As to the third supposition, as that some of the intestate's children are living and some dead, and those that are dead have left children: in this case, the grandchildren take by re-

^t Who these are, see pag. 77.

^u 4 Burn's Eccles. Law, 357.

^w Pag. 91.

^x 1 Strah. Dom. 624.

^y Pag. 64.

^z 4 Burn's Eccles. Law, 347.

presentation,

presentation, and not in their own right, and the issue of each deceased child stand in the place and stead of their deceased parent. As suppose the intestate to have had three children, A, B, and C, and one of these children to be dead, as it may be A, leaving three children, and another dead, as it may be B, leaving two; then the distribution must be one third to A's three children, another third to B's two children, and the remaining third to C, the surviving child. But if C had also died, and left no issue, then A's and B's five children, being all in equal degree of kindred, would take in their own right, each of them an equal share, in like manner as is just before mentioned under the second supposition.

By this we may see in what manner the intestate's personal estate is to be distributed, where he has left a wife and children, or representatives of children. But before we conclude this, and proceed to another part of the statute of distribution, it may be proper to observe, that if the intestate leaves but one child, or the representative, that is, the lineal descendant of one child, such one child, or the representative of such, will be entitled to the same share in the distribution, as if there were more than one. For where there is only one person that can take, the statute vests the right in that person^a. And although by the statute, no distribution is to be made within a year; yet the right of the distributive share vests immediately on the intestate's death. As where a person, intitled to a distributive share of an intestate's estate, died within a year after the intestate, it was decreed that the share of the deceased person was an interest vested and transmissible to his executors or administrators; for in this sense the statute makes a will for the intestate, and it is as if a legacy was bequeathed payable a year hence, which would plainly be an interest vested presently^b.

By the statute 22 & 23 Car. II. c. 10. sect. 6. In case there be no children, nor any legal representatives of them, then one moiety of the intestate's estate is to be allotted to the wife of the intestate; and the residue to be distributed to every the next of kindred of the intestate, who are in equal degree, and those who legally represent them.

^a 2 P. Will, 50.

^b 3 P. Will, 49.

74 *The DISPOSAL of a PERSON'S ESTATE*

By sect. 7, No representation is to be admitted among collaterals after brothers and sisters children ^c. And in case there be no wife, then all the said estate is to be distributed to and amongst the children. And in case there be no child, then to the next of kindred in equal degree of or unto the intestate, and their legal representatives, as aforesaid.

HENCE we may perceive, that where the intestate leaves no child, or any legal representative of a child, that is, lineal descendant, there the wife has a moiety, or one-half of his personal estate; and if there be no wife, then all the estate is to be distributed amongst the children; and if there be no child, then amongst the next of kindred in equal degree of or unto the intestate. But if there be a child, or representative, that is, lineal descendant, then the next of kindred will be totally excluded. For if a person dies intestate, leaving a descendant of either sex, or of whatsoever degree, such descendant is to be preferred to all ascendants and collaterals. And herein agrees the civil, canon, common, and statute laws ^d. So if there be children, or representatives of children, and no wife, we must observe what has been before said respecting children that have been advanced, bringing such advancement into hotchpot, and then how the estate is to go to the intestate's children, or if dead, to their representatives, as here distribution must be made of the whole of the estate in the same manner as where there is a wife, distribution must be made of two-thirds ^e.

HAVING now proceeded, as far as relates to the intestate's widow and children, before we enter any farther into the statute of distribution, we may take notice of the statute of 1 Jac. II. c. 17. whereby it is enacted, that if after the death of a father, any of his children shall die intestate, without wife or children, in the lifetime of the mother; every brother and sister, and the representatives of them, shall have an equal share with her. Before this statute, if a child had died intestate, without a wife, child, or father, the mother would have been intitled to the whole personal estate ^f; as the father surviving is at this day ^g: and the reason of making this statute was, because

^c See this explained page 77.

^d 4 Burn's Ecclef. Law, 346.

^e See pag. 70—73.

^f 4 Burn's Ecclef. Law, 349.

^g 2 P. Will. 48.

the mother might marry and carry away all to another husband^h. Upon this statute it has been determined, that where, after the death of the father, the son died intestate without issue; but leaving a wife, a mother, three brothers, a sister, and two nieces, the children of a deceased brother; that this is within the statute, and that the intestate's wife shall have but one moiety; and as to the other moiety, the intestate's brothers and sisters, and the two nieces, shall come in for an equal share with the motherⁱ. But if there be no brother or sister, or representative of brother or sister, then it is out of the statute, and the mother shall have the whole, as she had before the making of it^k. Hence it is obvious, that if a child dies without issue, then comes in the father; if the father be dead, then comes in the mother, brothers, and sisters; but, if there be no brother or sister, or representative of a brother or sister, which must be a child or children, as has been determined upon, the construction of the statute of Car. II.^l (and it is the same in respect of the statute of Jac. II.^m) then the mother takes the whole, or the half where there is a wife, and the whole where there is no wife, as the father always doth if living, and that in exclusion of the intestate's brothers and sisters, and their children. — A brother or sister of the half blood shall have an equal share with those of the whole bloodⁿ. — Upon the construction of the statute of Car. II. it has been determined that a *posthumous* brother or sister, or brother or sister born after the father's death, shall share equally with the other brothers and sisters^o. And where the question upon the statute of 1 Jac. II. was, whether a *posthumous* sister is intitled to a share of her brother's personal estate equally with her mother? after many arguments had thereon, lord chancellor Hardwick decreed for the *posthumous* sister^p.

^h 1 Salk. 251.

ⁱ 2 P. Will. 344.

^k 4 Burn's Eccles. Law. 362.

^l Pag. 77.

^m Case of Stanley and Stanley, 4 Burn's Eccles. Law, 365.

ⁿ Atk. 458.

^o Com. Dig. Administration (H.)

^p Case of Burnet and Man, Vez.

156.

^q Case of Wallis and Hodson,

IN respect to how distribution is to be made, between the intestate's mother, brothers, and sisters, we may observe that each of these share alike; as where a man died intestate, and without issue, leaving a wife and several brothers and sisters, and his mother living, the wife, under the statute of Car. II. takes a moiety; and a question arising upon the statute of Jac. II. how the other moiety should be distributed, whether the mother should have the whole, or only a distributive share with the brothers and sisters? a bill was brought, in order to have the opinion of the court. Upon hearing, the lord chancellor King was clearly of opinion, and decreed, that the mother should have no more than a share of the other moiety, with the brothers and sisters of the intestate; for the intent of the statute was, to put the mother (who before stood upon the same footing with the father) in the same state and condition with these collaterals; so that whenever she is intitled, they shall have an equal share with her^q. But where a man died intestate, leaving a wife, and a mother living, and children of a brother deceased; these children, as representatives of their father, bringing a bill to have one half of the moiety of the intestate's estate, the wife being intitled to the other moiety, and the mother (as they insisted) to have only an equal share with them; lord chancellor Hardwick ordered the residue of the intestate's estate, after satisfaction of debts, to be divided into four equal parts; two-fourth parts thereof to go to the widow, one-fourth to the mother, and one-fourth to the brother's children^r.—If a brother or sister is living, and also children of a deceased brother or sister, such children will take *per stirpes*, as hereafter mentioned (p. 81.)

HAVING said thus much concerning the statute of 1 Jac. II. we may now return to that part of the statute of distribution that relates to collaterals, and the intestate's next of kindred in equal degree; and first we will consider what is said relative to collaterals, and then what is said relative to the intestate's next of kindred, in equal degree. As to collaterals the statute says, "There is no representa-

^q Case of Keilway and Keilway, T. 12 Geo. II. Str. 710.

^r Case of Stanley and Stanley, May 14, 1739. 1 Atk. 458.

tion admitted among collaterals after brothers and sisters children." Upon these words of the statute, where the question was, Whether these words were intended of brothers and sisters to the intestate, or whether, when distribution falls out amongst brothers and sisters, though remote relations to the intestate, representation should be admitted amongst them? it was held, that representation should only be between the brothers and sisters to the intestate^s. And this representation amongst brothers and sisters does not extend to their grandchildren. For where the persons claiming distribution were a deceased brother's daughter, and the grandchildren of another deceased brother; it was held that the deceased brother's daughter only was intitled; and that a deceased brother's or sister's grandchildren should not come in with a deceased brother or sister's children^t. And as to representation among other relations: Where a man died without wife or child, brother or sister, and his next of kin were an uncle by his mother's side, and a deceased aunt's child; upon a demurrer, the court of chancery allowed the uncle to have the whole, and the deceased aunt's child nothing^u; and though this may seem hard, yet, as the lord chancellor said in this case, so is the law.

As to the part of the statute where it is said, "The next of kindred in equal degree of or unto the intestate, and their legal representatives;" we have seen that these words, "their legal representatives," are wholly confined to the intestate's brothers and sisters, and that no representation is admitted among collaterals after brothers and sisters children; by which the number of persons intitled are less than they otherwise would be. What we have now to consider is, who are these next of kindred in equal degree of or unto the intestate, that may be intitled to his estate? And here we may observe, that kindred are distinguished either by the right line or by the collateral. The right line is of parents and children, computing by ascendants and descendants; the collateral line is between brothers and sisters, and the rest of the kindred, among themselves. Those of the right line are reckoned upwards as parents, or downwards as children; those of the collateral line

^s Case of Maw and Harding, 2 Vern.

^u Case of Bower and Littlewood,

233.

1 P. Will. 594.

^t Case of Pett and Pett. F. Will.

25. 1 Salk. 250.

are reckoned *ex transverso*, or side-ways, as brothers and sisters, uncles and aunts, and such as are born from them ^v. Amongst those there are different degrees of kindred, which are differently reckoned by the civil and canon laws, yet in the ascending and descending lines, the degrees are the same by both laws; but in the collateral line they differ ^x. And for the distribution of personal estate, those degrees of kindred are reckoned according to the computation of the civil law; and not of the canon law, which the law of England adopts in the descent of real estates ^y. In the descending line, the son is in the first degree, the grandson in the second, and the great-grandson in the third. In the ascending line, the father is in the first degree, the grandfather in the second, and the great-grandfather in the third. In the collateral line, as reckoned according to the computation of the civil law, we ascend first to the father, which is one degree; from him to the common ancestor, the grandfather, which is the second degree; from the grandfather we descend to the uncle, which is the third degree; and from the uncle to the cousin-german, or uncle's child, which is the fourth degree. So again we ascend to the father, which is one degree; from the father we descend to the brother, which is the second degree; from the brother to the nephew, which is the third degree; and from the nephew to the son of the nephew, which is the fourth degree ^z.

How some of those degrees of kindred will be intitled to the intestate's personal estate, will be seen by the following adjudged cases; which, after being related, some observations will be made concerning the persons who will be intitled to such personal estate, pursuant to the statutes of 22 & 23 Car. II. and 1 Jac. II. and thereby we may have a brief and comprehensive view of them.

IN many cases where it hath happened, that the next of kindred to the intestate were a grandfather and a brother; suits have been commenced to determine their right: but

^v Ayliffe's Parergon, 327.

^x 4 Burn's Eccles. Law, 343.

^y Black. Com. 2 V. 504.

^z 4 Burn's Eccles. Law, 348.

now this point seems to be fully determined, in consequence of three determinations, the first of which was in the case of *Pool and Wilshaw*, T. 1708. The second in the case of *Norbury and Vicars*, before Fortescue, master of the Rolls, M. 1749; and the third was delivered by lord chancellor Hardwick, in the case of *Evelyn and Evelyn*, H. 1754, and determined in favour of the brother, in exclusion of the grandfather. In delivering the determination of the court in this case. By lord chancellor Hardwick. This case is between the grandfather and brother of the deceased. It is insisted on behalf of the grandfather, that he is in equal degree of consanguinity with the brother of the deceased, and intitled to an equal share of his estate, under the statute of distribution. The statute says, that the ordinary (in case there shall be no wife, children, or childrens children) shall make a just and equal distribution among the next of kindred to the dead person, in equal degree, or legally representing their stocks, *pro suo cuique jure*, "according to the laws in such cases, and the rules and limitations hereafter set down." Which limitation is only a particular specification, in what cases representation shall be allowed; and there is nothing more expressed in the statute, than that the estate shall be distributed equally to every the next of kin to the intestate, who are in equal degree.—This point has been already twice determined in courts of equity. First in the case of *Pool and Wilshaw*, and afterwards in the case of *Norbury and Vicars*. But it has been insisted on for the grandfather, that both these decrees are erroneous. Notwithstanding I shall adhere to the determination of the case of *Pool and Wilshaw*, I have seen the lord chief baron Ward's, and Mr. baron Price's reports of this case; and also that of Mr. Dodd (afterwards chief baron). The last of which, though but short, is the clearest of the three. It was a bill brought by the grandmother, for a share of her grandson's estate, equally with his brother. And it was insisted on for her, that she was in equal degree of consanguinity, and equally intitled; but the reporter says, "All the court contrary, and there has been no such usage since the making of the statute." And I know

know of none since; though it is 83 years since that statute was made. The subsequent decree at the rolls was conformable to this; and therefore I shall not attempt to overthrow these determinations. And after a full discussion of the subject, the lord chancellor concludes, by saying, that since not only the reasons are on this side the question, but the determinations have been that way, and to overthrow them would tend to introduce inconveniencies, as it might disturb distributions already made, which is an argument of the greatest weight in the law, I shall determine this point in favour of the brother, to the exclusion of the grandfather^a.

WHERE the intestate leaves a grandmother and an aunt, the grandmother will be intitled, in exclusion of the aunt; and as to this, lord chief justice Holt said, that as by the common law father and mother were nearer than brother and sister, so grandfather and grandmother are nearer than uncle and aunt. And the grandmother is the root of the kindred, whereas the aunt is only a branch^b. So in a cause in the court of chancery, it was clearly agreed, that if one dies intestate, leaving a grandmother and uncles and aunts, the grandmother is intitled to the personal estate, in exclusion of the uncles and aunts^c.—Where the next of kindred to the intestate were a grandfather by the father's side, and a grandmother by the mother's, it was decreed, that they shall take in equal moieties, as being in equal degree; for though the grandfather by the father's side may in some respects be more worthy of blood, yet in this respect dignity of blood is not material^d; though it is in respect of the descent of lands, as we shall see in the ensuing chapter^e.—Where the intestate left two aunts, and a nephew and a niece, children of a deceased brother, lord chancellor Hardwick ordered the surplus to be divided into four parts equally amongst them, they being all in equal degree, and therefore the children do not take by representation, but in their own right; but if the father of the nieces had been living, he would have taken the whole^f.

^a 4 Burn's Eccles. Law, 351.

^b Case of Blackborough and Davis,
1 Salk. 38. 351. 12 Mod. 623. 1 P.
Will. 51.

^c Case of Woodroffe and Wickworth,
Prec. Cha. 527.

^d 1 P. Will. 53.

^e Pag. 87.

^f Case of Durand and Prestwood,
1 Atk. 455.

HERE, as was proposed, we may observe, who those persons are that will be intitled to the intestate's personal estate, pursuant to the statutes of the 22 & 23 Car. II. and 1 Jac. II. As in the first instance, where a man dies leaving a wife and children; the wife has a third, the children and the representatives of deceased children the other two thirds^g. 2. If there be no wife, the children, and representatives of deceased children, have the whole; and that in exclusion of all ascendants and collaterals whatever^h. 3. In case there be no child, or representative of any child, that is, lineal descendant; then the wife has always one half whoever has the other halfⁱ. 4. If there be no wife nor lineal descendant, then the intestate's father, if living, has the whole^k. 5. If the father be dead, then the intestate's mother, brothers and sisters, and the children of the deceased brothers and sisters (if any), have the whole^l. 6. If there be no brother or sister of the intestate, or child of a brother or sister, then the mother has the whole^m. 7. Where the deceased leaveth neither wife nor child, nor representative of such child, nor father, nor mother; but leaves brothers and sisters, and children of other brothers and sisters deceased; the brothers and sisters, and the children of the brothers and sisters deceased, have the whole, and the children of the brothers and sisters deceased take *per stirpes*, and not *per capita*; for the children of the deceased, being not equal in degree with their uncles and aunts, do take in this case, not in their own rights, but by way of representation of their parents deceased. As if there had been three brothers of the deceased, A, B, and C; and A had died, leaving three children, and B leaving two; the distribution must be one third to A's three children, another third to B's two children, and the remaining third to C the surviving brother. But if the three brothers had all been living, then the intestate's estate must have been divided into three equal portions, and distributed *per capita*, one to each, as has been said concerning the intestate's children and grandchildrenⁿ.—Where all the brothers and sisters of the intestate are dead, some having left children, as it may be, some a greater, others a less number; those

^g Pag. 70—73.

^h Pag. 74.

ⁱ Pag. 73—75.

^k Pag. 74, 75.

^l Pag. 75, 76.

^m Pag. 75.

ⁿ Pag. 71—73.

children of the brothers and sisters deceased, take *per capita* each an equal share, as has been observed before respecting the intestate's grandchildren °. 9. If a person die intestate, leaving neither wife nor child, nor representative of such child, nor father nor mother, nor brother nor sister, but hath a grandfather or grandmother living; then the grandfather or grandmother has the whole personal estate, in exclusion of the intestate's uncles and aunts; and if there be a grandfather on the father's side, and a grandmother on the mother's side, the whole is divided between them; and so it is if there be a grandmother on the father's side, and a grandfather on the mother's side p. 10. If a person die intestate, leaving neither wife nor child, nor representative of such child, nor father nor mother, nor brother nor sister, nor grandfather nor grandmother, but leaving uncles and aunts, and brother's or sister's children; those uncles and aunts, whether on the father's side or mother's, will share the intestate's whole personal estate, together with his brother's and sister's children q.

IF a person die intestate, leaving none of those relations, the general rule by the statute of distribution is, that his personal estate shall go to his next of kindred in equal degree; and those may be the children of his uncles or aunts, and his brothers or sisters grandchildren, all of whom being in the fourth degree, will share equally alike; and if there is but one person that can take, as being the only person who is the nearest of kin, the statute vests the whole in that person r. — For further discovering the degrees of kindred, when none of those that have been mentioned are to be found, we may observe the following table, which is laid down conformably to what has been before-mentioned respecting the mode in which the different degrees of kindred are to be reckoned. We may likewise observe, that where there are relations, both by the father's side and mother's, in equal degree

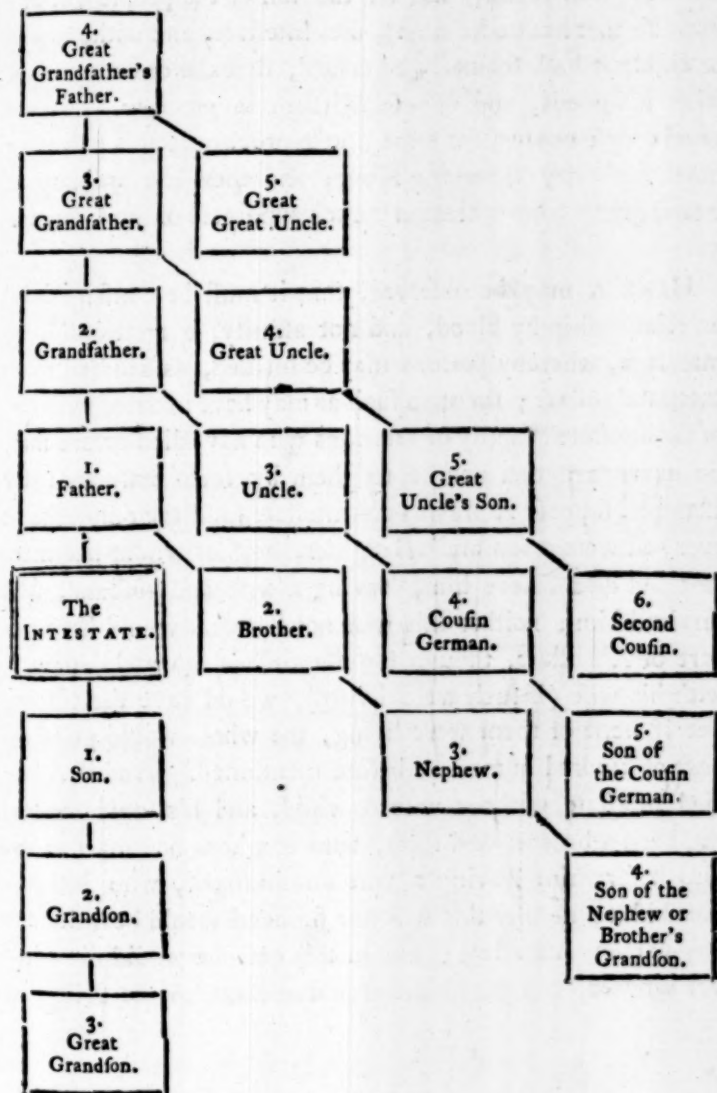
° Pag. 72.

p Pag. 80.

q Pag. 80.

r Pag. 73.

of kindred, they share equally alike; for here there is no difference (though there is in respect of real estate, as we shall see in the ensuing chapter), whether the relations be by the father's side or by the mother's; but those who are nearest of kin will be preferred, be it by which side it may: and the half blood will be equally intitled with those of the whole blood.



IF the intestate have no kindred, his estate will escheat to the King, or to the lord of the manor, or other person entitled thereto, by virtue of any grant from the Crown; for where no person can claim any property, there the King shall be intitled by his prerogative. Where a bastard who has no kindred, being, as the law terms him, *nullius filius*, that is, the son of no one, or as he is sometimes termed, *filius populi*, that is, the son of the people (or any one else that has no kindred), dies intestate, and without wife or child, it hath formerly been held, that the ordinary might seize his goods, and dispose of them in *pious usus*. But the usual course now is, for some one to procure letters patent, or other authority from the King; and then the ordinary of course grants administration to such appointee of the Crown^t.

HERE it may be observed, that it must be consanguinity or relationship by blood, and not affinity, a relationship by marriage, whereby persons may be intitled, as kindred to an intestate's estate; for as to such as may have married with any of the intestate's family or relations who have died before him, no advantage can accrue to them by such marriage: for example, suppose A was to die intestate, and the only issue he ever had were a son and a daughter, both of whom had married and died before him, leaving a wife and husband, who survived him; neither this wife nor husband would have any part of A's estate, though the issue of his son and daughter, with his wife (if such were living), would have the whole; but if none of them were living, the whole would go to his next of kindred in manner before mentioned. And if A had died intestate without wife or child, and his only kindred had been a brother and sister, both of whom had married and died before him leaving a wife and husband, who had survived him; neither this wife nor husband would be intitled to any part of A's estate; but in this case he would die without kindred, and his estate would escheat to the King, or

^t Black. Com. 2 V. 505.

lord of the manor, or other person who might be intitled thereto by virtue of any grant from the Crown, as before-mentioned; and so it would be in respect to the husband of A's mother, and the husband or wife of any one that were his next of kin, and had married and died before him. But in case his son or daughter, brother, sister, or mother, or any other who were his next of kin, had survived him, and died in ever so short a time after; then the husband or wife of him, or she that had survived him, might be intitled; that is, the husband in right of the wife, and the wife in respect of her husband; but neither of them as being of kin to A. The right of the distributive share vests immediately on the intestate's death, as was before mentioned^u. Although by the statute no distribution is to be made within a year; yet the share of the deceased person is an interest vested and transmissible to his executors or administrators.

^u Pag. 73.

C H A P. IV.

The Descent of real Estates, or Estates of Inheritance. How the Law disposes thereof to the Heir; the Husband of a deceased Wife, and the Wife of a deceased Husband.

SECTION THE FIRST.

HOW THE LAW DISPOSES OF THE INHERITANCE TO THE HEIR.

TO enter into a discussion of the various descents of real estates, would here tend to breed embarrassment and confusion, I shall therefore at present confine myself to the law of descents in fee-simple (which, we shall presently see, is a point of no small importance), and towards the conclusion of this chapter shall make some observation on descents by particular customs.——Fee-simple is, where a man hath lands, tenements, or hereditaments; to hold to him and his heirs for ever, generally, absolutely, and simply, without any particular heirs being mentioned, but that being referred to his own pleasure, or the disposition of the law, in case he makes no disposition thereof himself, as he may to whom he thinks fit: and here it must be observed, that no person can be properly such an ancestor, as that an inheritance in lands or tenements can be derived from him, unless he hath had actual seisin of such lands, either by his own entry, or by the possession of his own or his ancestor's lessee for years, or by receiving rent from a lessee of the freehold^a; or unless he hath had what is equivalent to corporal seisin in hereditaments that are incorporeal; such as the receipt of rent, a presentation to the church in case of an advowson, and the like^b. And therefore all the cases which will be hereafter mentioned (respecting descent to the heir), are upon the supposition that the deceased was the last person actually seised of the inheritance. For the law requires this notoriety of possession, as evidence that the ancestor had that property in himself which is to be transmitted to his heir^c.

^a Co. Litt. 15.

^b *Ibid.* 11, Black. Com. 2 V. 209.

^c Black. Com. 2 V. 209.

DESCENT, or hereditary succession, is a title whereby a man, on the death of his ancestor, acquires his estate by right of representation, as his heir at law. An heir therefore is he upon whom the law casts the estate immediately on the death of the ancestor: and an estate so descending to the heir, is in law called the inheritance. The doctrine of descents, or law of inheritances, in fee-simple, is a point of the highest importance, and the principal object of the laws of real property in England. All the rules relating to purchases, whereby the legal course of descent is broken and altered, perpetually refer to this settled law of inheritance, as a *datum*, or first principle universally known, and upon which their subsequent limitations are to work. Thus a gift in tail, or to a man and the heirs of his body, is a limitation that cannot be perfectly understood without a previous knowledge of the law of descents in fee-simple. It may be perceived, that this is an estate confined in its descent, to such heirs only of the donee as have sprung, or shall spring from his body; but who those heirs are, whether all his children both male and female, or the male only, and (among the males) whether the eldest, youngest, or other son alone, or all the sons together, shall be his heir; this is a point, that we must resort back to the standing law of descents in fee-simple to be informed of^d. — As to fee-tail, see a brief description thereof p. 115. — In order to obtain a right conception of the law of descents in fee-simple, it will be necessary to observe the following rules:

THE first rule is, that inheritances shall lineally descend to the issue of the person last actually seised, *in infinitum*, or for ever; but shall never lineally ascend. When therefore a person dies so seised, the inheritance first goes to his issue: as if there be A, B, and C, grandfather, father, and son; and B the father purchases land and dies; his son C shall succeed him as heir, and not A the grandfather; to whom the land shall never ascend, but shall rather escheat to the lord^e.

THE second rule is, that the male issue shall be admitted before the female. Thus sons shall be admitted before daughters. As if A hath two sons, C and D, and two daughters,

^d Black, Com. 2 V. 201.

^e Littleton, sect. 3.

E and F, and dies; first C, and (in case of his death without issue) then D, shall be admitted to the succession in preference to both the daughters^f.

THE third rule is, that where there are two or more males in equal degree, the eldest only shall inherit; but the females all together. As if a man hath two sons, A and B, and two daughters, C and D and dies; A his eldest son shall alone succeed to his estate, in exclusion of B the second son and both the daughters; but if both the sons die without issue before the father, the daughters C and D shall both inherit the estate as co-partners^g.

THE fourth rule is, that the lineal descendants, *in infinitum*, of any person deceased, shall represent their ancestor; that is, shall stand in the same place as the person himself would have done had he been living. Thus the child, grandchild, or great grandchild (either male or female) of the eldest son, succeeds before the younger son, and so *in infinitum*^h. And these representatives shall take neither more nor less, but just so much as their principals would have done. As if there be two sisters, A and B, and A dies leaving six daughters, and then J. S. the father of the two sisters dies without other issue; these six daughters shall take among them exactly the same as their mother A would have done, had she been living; that is, a moiety, or one half of the lands of J. S. in coparcenary: so that upon partition made, if the land be divided into twelve parts, B the surviving sister shall have six thereof, and her six nieces the daughters of A one apieceⁱ.

THIS taking by representation is called succession *in stirpes*, according to the roots; since all the branches inherit the same share that their root, whom they represent, would have done. For example, suppose the next heirs of *Titius* be six nieces, three by one sister, two by another, and one by a third; his inheritance by the law of England will be divided into three parts, and distributed *per stirpes*, thus; one third to the three children who represent one sister, another

^f Hale's Hist. C. L. 235. Black, Com. 2 V. 213.

^h Hale, 236, 237. Black, 2 V. 216.

ⁱ Black, 2 V. 217.

^g Hale, 238. Black. 2 V. 214.

third to the two who represent the second, and the remaining third to the one child, who is the sole representative of her mother^k. This mode of representation is a necessary consequence of the double preference given by our law, first to the male issue, and next to the first born among the males^l. The issue of the eldest son excludes all other pretenders, as the son himself (if living) would have done; but the issue of two daughters divide the inheritance between them, provided their mothers, if living, would have done the same^m. Among these several issues, or representatives of the respective roots, the same preference to males, and the same right of primogeniture or first birth obtain, as would have obtained at first among the roots themselves, the sons or daughters of the deceased. As if a man hath two sons, A and B, and A dies, leaving two sons, and then the grandfather dies; now the eldest son of A shall succeed to the whole of his grandfather's estate: and if A had left only two daughters, they should have succeeded also to equal moieties or halves of the whole, in exclusion of B and his issue. But if a man hath only three daughters, C, D, and E; and C dies leaving two sons, D leaving two daughters, and E leaving a daughter and a son, who is younger than his sister: here, when the grandfather dies, the eldest son of C shall succeed to one third, in exclusion of the younger; the two daughters of D to another third in partnership; and the son of D to the remaining third, in exclusion of his eldest sister. And the same right of representation, guided and restrained by the same rules of descent, prevails downward *in infinitum*ⁿ.

THE fifth rule is, that on failure of lineal descendants, or issue of the person last seised, the inheritance shall descend to the blood of the first purchasor, subject to the three preceding rules. Thus, if G. S. purchases land, and it descends to J his son, and J dies seised thereof without issue, whoever succeeds to this inheritance must be of the blood of G. S. the first purchasor of this family^o. The first purchasor is he who first acquired the estate to his family, whether the same was transferred to him by sale, or by gift, or by any other method except only that of descent^p. This is the principle

^k Black. Com. 2 V. 217.

ⁿ Black. 2 V. 218, 219.

^l *Ibid.* 218.

^o Hale, 217, 229. Black, 2 V. 220.

^m Hale, H. C. L. 237, 238. Black,

^p Black, 2 V. 220.

2 V. 218.

upon which the law of collateral inheritances depends; that upon failure of issue in the last proprietor, the estate shall descend to the blood of the first purchaser¹; or, that it shall result back to the heirs of the body of that ancestor, from whom it either really has, as is supposed by fiction of law to have originally descended. As if A dies without issue, his estate shall descend to C his brother, who is lineally descended from D his next immediate ancestor or father. On failure of brethren or sisters, and their issue, it shall descend to the uncle of A, the lineal descendant of his grandfather, and so on *in infinitum*².

HERE we must observe, that the lineal ancestors, though (according to the first rule) incapable themselves of succeeding to the estate, because it is supposed to have already passed them, are yet the common stocks from which the next successor must spring. And therefore the father, or other lineal ancestor, is himself said to be the heir, though long since dead, as being represented by the persons of his issue; who are held to succeed not in their own rights, as brethren, uncles, &c. but in right of representation, as the offspring of the father, grandfather, &c. of the deceased. But though the common ancestor be thus the root of the inheritance, yet with us it is not necessary to name him in making out the pedigree or descent. For the descent between two brothers is held to be an immediate descent; and therefore title may be made by one brother or his representatives to or through another, without mentioning their common father. If G hath two sons J and F, F may claim as heir to J, without naming their father G, and so the son of F may claim as cousin and heir to M the son of J, without naming the grandfather, *viz.* as son of F, who was the brother of J, who was the father of M. But though the common ancestors are not named in deducing the pedigree, yet the law still respects them as the fountains of inheritable blood: and therefore, in order to ascertain the collateral heir of J, it is in the first place necessary to recur to his ancestors in the first degree, and if they have left any other issue besides J, that issue will be his heir. On default of such, we must ascend one step higher to the ancestors in the second degree, and then to those in the third and fourth, and so upwards *in infinitum*, till some ancestor be found, who have other issue descending from

¹ Hale, H. C. L. 242, 243. Black, 1 Black, 2 V. 225.
Com., 2 V. 223.

them besides the deceased, in a parallel or collateral line. From these ancestors the heir of J must derive his descent; and in such derivation the same rules must be observed with regard to sex, primogeniture, and representation, that have before been laid down with regard to lineal descent from the person of the last proprietor^s.

HERE again we must observe, in respect to collateral inheritances, that the heir need not be the nearest kinsman absolutely, but only *sub modo*; that is, he must be the nearest kinsman of the whole blood; for if there be a much nearer kinsman of the half blood, a distant kinsman of the whole blood shall be admitted, and the other entirely excluded^t.

A kinsman of the whole blood is he that is derived, not only from the same ancestor, but from the same couple of ancestors. As if the blood of J. S. was composed of those of G. S. his father, and L. B. his mother, therefore his brother F, being descended from both the same parents, hath entirely the same blood with J. S. or he is his brother of the whole blood. But if after the death of G. S. L. B. the mother marries a second husband L. G. and hath issue by him; the blood of this issue, being compounded of the blood of L. B. (it is true) on the one part, but that of L. G. instead of G. S. on the other part, it hath therefore only half the same ingredients with that of J. S.; so that he is only his brother of the half blood, and for that reason they shall never inherit to each other. So also, if the father has two sons, A and B, by different venters or wives; now these two brethren are not brethren of the whole blood, and therefore shall never inherit to each other, but the estate shall rather escheat to the lord^u. Nay even if the father dies, and his lands descend to his eldest son A, who enters thereon, and dies seised without issue, still B shall not be heir to this estate, because he is only of the half blood to A, the person last seised; but, had A died without entry, then B might have inherited; not as heir to A his half-brother, but as heir to their common father, who was the person last actually seised^w.

^s Black. Com. 2 V. 226.

^t *Ibid.* 227.

^u *Ibid.*

^w Hale, H. C. L. 238. Black. 2 V. 227.

IN collateral inheritances the male stocks shall be preferred to the female (that is, kindred derived from the blood of the male ancestors shall be admitted before those from the blood of the female^x) unless where the lands have, in fact, descended from a female^y. Thus the relations on the father's side are admitted *in infinitum*, before those on the mother's side are admitted at all; and the relations of the father's father, before those of the father's mother, and so on^z. Yet whenever the lands have notoriously descended to a man from his mother's side, this rule is totally reversed, and no relation of his by his father's side, as such, can ever be admitted to them; because he cannot possibly be of the blood of the first purchaser. And so, *e converso*, if the lands descended from the father's side, no relation of the mother, as such, shall ever inherit. So also if they in fact descended to J. S. from his father's mother C. K.; here not only the blood of L. B. his mother, but also of G. S. his father's father, is perpetually excluded. And, in like manner, if they be known to have descended from F. H. the mother of C. K. the line not only of L. B. and of G. S. but also of L. K. the father of C, is excluded^a. Whereas when the side from which they descended is forgotten, or never known (as in the case of an estate newly purchased to be holden *ut feudum antiquum*, or as a feud of indefinite antiquity; as all the estates held in fee-simple throughout the kingdom are held^b), the right of inheritance runs up all the father's side, with a preference to the male stocks in every instance; and if it finds no heirs there, it then, and then only, resorts to the mother's side, leaving no place untried, in order to find heirs that may, by possibility, be derived from the original purchaser. The greatest probability of finding such was among those descended from the male ancestors; but upon failure of issue there, they may possibly be found among those derived from the females^c.

FROM what has been here said, the reader may form an idea of the law of descents in fee-simple; and for a more full and perspicuous view thereof, I must refer to the learned authors here cited, especially to the commentaries of judge Blackstone; where I need not say this subject is amply treated

^x Hale, H. C. L. 241. Black. Com.

^a Black. 2 V. 236.

^z V. 234.

^b *Ibid.* 222.

^y Black. 2 V. 234.

^c *Ibid.* 236.

^z Hale, 242. Black, 2 V. 334.

on, as it is well known; that book being in the hands of most of the profession of the law, as well as of many of the nobility and gentry throughout the kingdom; on which account, and for its repute and authenticity, I have so frequently cited it, instead of other authors.

As to the heir, he is much favoured by the law; as not being liable to pay any simple contract debts due from the deceased, not even if the estate was purchased with the money for which the simple contract debts are due^d. And in case the estate is mortgaged; if the deceased have left enough personal estate to discharge all his debts, the real estate must be redeemed for the benefit of the heir^e. But where the deceased has not left a sufficiency of personal estate to discharge all his debts, the real estate will be liable to answer those due by bonds and special contracts, whereby he hath bound himself and his heirs; and that whether it comes to the heir by descent, or is given to him or any other by will: and this will be real *assets*, or *assets* by descent, as has been mentioned^f.—By the statute of the 3 W. & M. c. 14. it is enacted, that all wills and testaments, limitations, dispositions, or appointments, of or concerning any manors, messuages, lands, tenements, or hereditaments; or of any rent, profit, term, or charge, out of the same, whereof any person at the time of his decease shall be seised in fee-simple, in possession, reversion, or remainder, or hath power to dispose of the same by his last will and testament; shall be deemed and taken to be fraudulent, and absolutely void and of none effect, against such persons, their heirs, successors, executors, administrators, and assigns, to whom the deceased shall, by bonds or other specialties, have bound himself and his heirs: and all such creditors may have and maintain actions of debt upon their bonds and specialties, against the heir at law of the obligor and such devisee jointly. Yet it is provided, that, where there shall be any limitation or appointment, devise or disposition, of or concerning any manors, messuages, lands, tenements, or hereditaments, for the raising or payment of any real and just debts; or any portions or sums of money for any child or children of any person, other than the heir at law, *according to any marriage contract or agreement in writing, bona fide, made before such marriage*, the same shall be in full force; and the same manors, mes-

^d Black. Com. 3 V. 430.

^e 2 Salk. 449. 1 Vern. 436.

^f Pag. 45.

suages, lands, tenements, and hereditaments, shall be holden and enjoyed by every such person, his heirs, executors, administrators, and assigns, for whom the said limitation, appointment, devise, or disposition was made, and by his trustee or trustees, their heirs, executors, administrators, and assigns, for such estate or interest as shall be limited or appointed, devised or disposed, until such debt or portion shall be raised and paid. — Where any heir at law shall be liable to pay the debt of his ancestor, in regard of any lands, tenements, or hereditaments descending to him, and shall sell, alien, or make over the same, before any action brought or process sued out against him; it is enacted, that such heir at law shall be answerable for such debt, in an action of debt, to the value of the land so by him sold, aliened, or made over; in which case all creditors shall be preferred, as in actions against executors and administrators, and such execution shall be taken out upon any judgment so obtained against such heir, to the value of the said land, as if the same were his own proper debt; saving that the lands, tenements, and hereditaments *bona fide* aliened before the action brought, shall not be liable to such execution.

SECTION THE SECOND.

HOW THE LAW DISPOSES OF A WIFE'S REAL ESTATE: OR THE LAW CONCERNING A TENANCY BY THE CURTESY OF ENGLAND.

WHERE a man taketh a wife seised of an estate in fee-simple, or fee-tail, and hath issue by her; although the issue afterwards die or live, the husband shall hold the land during his life, as tenant by the curtesy of England^a. To make a tenancy by the curtesy, these four requisites are necessary; marriage, seisin of the wife, issue and death of the wife. 1. The marriage must be canonical and legal. 2. The seisin of the wife, which must be an actual seisin or possession of the lands; not a bare right to possess, which is a seisin in law, but an actual possession, which is a seisin in deed: therefore a man shall not be tenant by the curtesy of a remainder or reversion^b. But entry is not always necessary to give seisin in deed; for if the land is in lease for years, curtesy may be without entry or even receipt of rent, the possession of the lessee for years being deemed the possession of

^a Co. Litt. 29.^b Black. Com. 2 V. 127.

husband and wife^c. And of some hereditaments a man may be tenant by the curtesy, though there have been no actual seisin of the wife; as in the case of an advowson, where the church has not become void in the lifetime of the wife; which a man may hold by curtesy, because it is impossible to have had actual seisin of it, and *impotentia excusat legem*^d, or impotency excuseth the law. And though, in strictness of law, there cannot be curtesy of trusts; yet the courts of equity have allowed curtesy both of trusts and other interests, which, though in law mere rights and titles, are deemed estates in equity. However, a wife, in point of benefit, may have a trust of inheritance which may be so declared as to prevent curtesy, as by directing the profits during the wife's life to be paid to her separate use^e.—If the wife be an idiot, the husband shall not be tenant by the curtesy of her lands; for the king, by prerogative, is entitled to them, the instant she herself has any title: and since she could never be rightfully seised of the lands, and the husband's title depends entirely upon her seisin, the husband can have no title as tenant by the curtesy^f.—3. The issue must be born alive. Some have had a notion that it must be heard to cry; but that is a mistake^g; crying indeed is the strongest evidence of its being born alive, but it is not the only evidence^h. The issue must also be born during the life of the mother; for, if the mother dies in labour, and the Cæsarean operation is performed, the husband, in this case, shall not be tenant by the curtesy; because, at the instant of the mother's death, he was clearly not intitled, as having had no issue born, but the land descended to the child, while he was yet in his mother's womb; and the estate, being once so vested, shall not afterwards be taken from himⁱ. The issue that must be so born alive, as has been observed, must also be capable of inheriting the mother's estate^k. Wherefore, if a woman be tenant in tail male, and hath only a daughter born, the husband is not thereby intitled to be tenant by the curtesy; because such issue female can never inherit the estate in tail male: and if a woman be delivered of a monster, which hath not human shape, he is not capable of inheriting; yet, if he hath human shape, though deformed in body, he is capable^l. The time when the issue was born is immaterial, provided it is born during the coverture; for whether it be born before or after the wife's seisin of the lands, whether it be living or dead at the time of the seisin, or at the time of the wife's decease, the husband shall be tenant by the curtesy^m.—4. By the

^c Co. Litt. 29. Note 3. 13 Edit.

^d Black. Com. 2 V. 127.

^e Co. Litt. 29. Note 6. 13 Edit.

^f Black. Com. 2 V. 127.

^g *Ibid.*

^h 8 Co. Rep. 34.

ⁱ Co. Litt. 29.

^k Black. Com. 2 V. 123.

^l Co. Litt. 29.

^m *Ibid.*

death of the wife (after issue had as before observed) the husband becomes tenant by the curtesy, and not beforeⁿ. Yet, by the birth of a child, he becomes tenant by the curtesy *initiate*, and may do many acts to charge the lands, but his estate is not *consummate* till the death of the wife^o.

By thus becoming tenant by the curtesy, the husband is intitled to hold the estate during his life, and immediately after his death the same must inevitably go to the heir, whether he be a child or distant relation of the wife; and this the husband, as being only tenant by the curtesy, can in no wise prevent; for he cannot alien this estate for any longer term than his own life: wherefore, and for that it may so happen, the husband, on the death of the wife, may have no further benefit from the estate, of which during his wife's life he hath been intitled to the rents and profits; a tenancy by the curtesy seldom happens, where the wife is seised in fee-simple at any time during her coverture; for although she cannot devise this estate by will, as being restrained by the statute of 34 & 35 Hen. VIII. c. 5. neither will the law permit her to convey it to her husband or any other person whatever. For all deeds executed, and acts done by her during her coverture, are void; except it be a fine, or like matter of record, in which case she must be solely and secretly examined, to learn if her act be voluntary^p. Yet by a fine, in which she and her husband must join, the estate may be conveyed and assured to any person or persons, for such uses and purposes as the husband and wife shall think fit.

SECTION THE THIRD.

HOW THE LAW DISPOSES OF AN HUSBAND'S REAL ESTATE: OR THE LAW CONCERNING A TENANCY IN DOWER.

THE wife is intitled by law to be endowed of one-third part of all such lands and tenements, of which her husband was seised in fee-simple or fee-tail, at any time during the coverture or marriage; to hold the same during the term of her natural life^q. But that she may be intitled thereto,

ⁿ Co. Litt. 30.

^o Black. Com. 2 V. 128.

^p *Ibid.* 1 V. 444.

^q Co. Litt. 31.

she must be the wife of the party at the time of his decease; for if she be divorced *a vinculo matrimonii*, that is, from the band of matrimony, she shall not be endowed; for *ubi nullum matrimonium ibi nulla dos*, that is, where there is no marriage there is no dower. But a divorce *à mensa et thoro*, or from bed and board only, doth not destroy the dower; not even if it is for adultery itself by the common law^r. But by the statute 13 Edw. I. c. 34. if a woman elopes from her husband, and lives with an adulterer, she shall lose her dower, unless her husband be voluntarily reconciled to her. And the widows of traitors, or persons attainted of treason, are barred of their dower (except in the case of certain modern treasons relating to the coin^s); but not the widows of felons^t. An alien (one born out of the King's allegiance) cannot be endowed, unless she be queen consort; for no alien is capable of holding lands. And that the wife may be endowed, she must be above nine years old at her husband's death, otherwise she shall not be endowed^u.

THE wife being intitled by law to be endowed of one-third part of all such lands and tenements of which her husband was seised in fee-simple or fee-tail, at any time during the coverture or marriage, shall hold such one-third part during the term of her natural life; and that whether she hath issue by her husband or not^w, provided any issue which she might have had, might by possibility have been heir. Therefore, if a man seised in fee-simple hath a son by his first wife, and after marries a second wife, she shall be endowed of his lands; for her issue might by possibility have been heir on the death of the son by the former wife. But, if there be a donee in special tail, who holds lands to him and the heirs of his body begotten on Jane his wife; though Jane may be endowed of these lands, yet if Jane dies, and he marries a second wife, that second wife shall never be endowed of the lands entailed; for no issue that she could have, could by any possibility inherit them^x. A seisin in law (that is, a right to possess) of the husband, will be as effectual as a seisin in deed, which is an actual possession^y, in order to render the wife dowable; for it is not in the wife's power to bring the husband's title to an actual seisin^z. Yet the seisin of the husband for a transitory instant only, when the same act which gives him the estate conveys it also out of him again

^r Co. Litt. 32.

^s Stat. 5 Eliz. c. 11. 18 Eliz. c. 1.

^t Black. Com. 2 V. 131.

^u Co. Litt. 31.

^w Ibid.

^x Black. Com. 2 V. 131.

^y Ibid. 127.

^z Co. Litt. 31.

(as where by a fine land is granted to a man, and he immediately renders it back by the same fine), such a seisin will not entitle the wife to dower^a: for the land was merely *in transitu*, and never rested in the husband. But if the land abides in him for a single moment, it seems that the wife shall be endowed thereof. This doctrine was extended very far by a jury in Wales, where the father and son were both hanged in one cart, but the son was supposed to have survived the father, by appearing to struggle longest; whereby he became seised of an estate by survivorship, in consequence of which seisin his widow had a verdict for her dower^b. A widow may be endowed of all her husband's lands, tenements, and hereditaments, corporeal or incorporeal, under the restrictions before mentioned, unless there be some special reason to the contrary. Thus, a woman shall not be endowed of a castle built for defence of the realm, because it ought not to be divided. But of a castle that is only for the private use and habitation of the owner, a woman shall be endowed^c. So a woman shall not be endowed of a common without stint; for as the heir would then have one portion of this common, and the widow the other, and both without stint, the common would be doubly stocked. But a woman shall be endowed of a common certain; and so of other incorporeal hereditaments; as rent-service, rent-charge, and rent-seck^d, mentioned in a former chapter^e.—Though curtesy out of a trust is allowed, as was mentioned in the former part of the foregoing section; yet dower has been refused thereout; a partiality not easy to be reconciled with reason, however settled by the current of authorities^f.—Where dower is allowable, it matters not though the husband alien or sell the lands during the coverture; for he aliens them liable to dower^g, of which the wife cannot be barred but by a fine, or like matter of record, to which she must be privy, and privately examined: wherefore, and for saving the expence of a fine, it is common where the estate is but of small value, for the husband when he conveys it, to bind himself by a bond, to save harmless and keep indemnified the purchaser, against any claim that might afterwards be made for or in respect of dower. Yet as there is no method of effectually barring the wife but by a fine, or like matter of record, the bond can be but of little use if the obligor should die insolvent; so that it behoves the purchaser, in case he takes

^a Co. Litt. 31.^b Black. Com. 2 V. 132.^c Co. Litt. 31.^d *Ibid.* 32.^e Pag. 24.^f Co. Litt. 29. Note 6. 13 Edit.^g *Ibid.* 32.

a bond instead of having a fine passed, to look well to the probability of the obligor's dying solvent; and leaving a sufficiency to discharge the bond; in case dower should be demanded.

BUT it now seldom happens that the wife has any claim to dower; for not only upon most preconcerted marriages, where a settlement is made pursuant to the statute of 27 Hen. VIII. c. 10. and thereby she is barred by a jointure made to her in lieu thereof, but when a man purchases an estate in fee-simple, it is usual for him, in order to prevent his wife having any claim of dower therefrom, and to save the expence of a fine in case he should sell it, to have the estate conveyed to him in joint-tenancy, which is usually done in manner following; as for example, suppose A. B. to be the grantor, C. D. the grantee who purchases this estate, and E. F. a friend of C. D. the grantee. Now, in consideration of the sum agreed for by C. D. to be given to A. B. for this estate, and in consideration of 5s. a piece paid by the said C. D. and E. F. the said A. B. sells and aliens this estate to C. D. and E. F. TO HOLD unto the said C. D. and E. F. and their heirs, to the use of the said C. D. and E. F. and the heirs of the said E. F. In trust nevertheless, as to the estate and interest of the said E. F. and his heirs, to the only proper use and behoof of the said C. D. his heirs and assigns for ever, and to and for no other use, trust, intent, or purpose whatsoever. So by this means C. D. the purchaser, takes this estate in joint-tenancy with E. F. though E. F. has no other interest therein than as a trustee for C. D.; yet as the estate is conveyed to C. D. and E. F. in joint-tenancy, the wife of C. D. can have no claim or title to dower therefrom, and C. D. can sell and safely convey this estate to a purchaser, without passing a fine to bar his wife of dower.

HERE we may observe what has been said concerning the descent of estates held in fee-simple, and how the law disposes thereof, and of those held in fee-tail, that this is consistent with the general law of the land. But particular counties, cities, towns, manors, and lordships, being indulged with the privilege of abiding by their own customs, which privilege is confirmed to them by several acts of parliament, those customs prevail in contradistinction to the rest of the nation at large^b. Of those customs is the custom of gavel-kind, chiefly subsisting in Kent, though it is to be found in other parts of the kingdom^c. By this custom, not only the eldest son of the father shall succeed to his inheritance, but all the sons alike^d.

^b Black. Com. 1 V. 74.

^c *Ibid.*

^d Co. Litt. 175.

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And though the ancestor may be attainted and hanged, yet the heir shall succeed to his estate without any escheat to the lord¹. And by this custom the husband shall be tenant by the curtesy without having any issue^m; yet curtesy by the custom of gavel kind, is subject to several disadvantages; for it is only a moiety of the wife's land, and it ceaseth if the husband marries againⁿ. — By the statute 31 Hen. VIII. c. 3. a great part of Kent is made descendable to the eldest son, according to the course of the common law; as by means of that custom divers ancient and great families, after a few descents came to very little or nothing^o. And there are six other statutes for disgavelling particular lands in Kent, besides the 31 Hen. VIII. though that is the only statute in print. Those are mentioned in Mr. Robinson's book on gavel kind^p. — Another of those customs is the custom that prevails in divers ancient boroughs, and therefore called borough-english, whereby the youngest son shall inherit the estate in preference to his elder brothers^q. And there is a custom in other boroughs that a widow shall be entitled for her dower to all her husband's lands; whereas by the common law she shall be endowed of one third part only^r. Likewise there are special and particular customs of manors, of which every one has more or less, and which bind all the copy-hold and customary tenants that hold of the said manors^s. Some copyholders are for lives, one, two, or three successively; and some inheritances from heir to heir by custom; and custom ruleth these estates wholly, both for widows estates, fines, heriots, forfeitures, and all other things^t. — The customs that prevail in the city of London and province of York, which comprehend so considerable a part of the kingdom, will be the subject of the ensuing chapter.

¹ Black. Com. 1 V. 74. 2 V. 84.

^m Co. Litt. 30.

ⁿ *Ibid.* Note 1. 13 Edit. Refers to Robins. Gavelk. b. 2. c. 1. and says,

“There the learned author suggests, that some have doubted, whether

“there is any such variance between

“the common law and the custom, and

“therefore undertakes to prove it by
“authorities on record.”

^o Co. Litt. 140.

^p *Ibid.* Note 2. 13 Edit.

^q Black. Com. 1 V. 75.

^r *Ibid.*

^s *Ibid.*

^t Bacon's Law Tracts, 137.

C H A P. V.

The Customs of the City of London and Province of York.

SECTION THE FIRST.

WHEREIN THE CUSTOMS OF LONDON AND YORK AGREE, AND WHEREIN THEY VARY.

WHAT those customs are within the city of London and province of York, which comprehend so large and considerable a part of the kingdom, it is somewhat strange, says Dr. Burn, that so few authors have taken any pains to inform their readers or themselves; and that those customs are so ancient, and of ancient times were of such general and almost universal extent, that some of the greatest lawyers have doubted whether they were not part of the common law^a. Formerly, not only in the province of York and city of London, but in most, if not in all parts of England, a man was restrained from bequeathing the whole of his personal estate away from his wife and children; but the law in that particular is now altered, though it continued in the province of York, the principality of Wales, and in the city of London, later than in other parts of the kingdom, and till very modern times; when in order to favour the power of bequeathing, and to reduce the whole kingdom to the same standard, three statutes were provided, the one 4 & 5 W. & M. c. 2. explained by 2 & 3 Ann. c. 5.^b for the province of York; another 7 & 8 W. III. c. 38. for Wales; and a third 11 Geo. I. c. 18. for London: whereby it is enacted, that persons within those districts, and liable to those customs, may (if they think proper) dispose of all their personal estates by will; and the claims of the widows children

^a Eccles. Law. 4 V. 368.

^b This statute of 2 & 3 Ann. recites, that a proviso was contained in the statute 4 W. & M. that nothing therein contained should extend to the citizens of the city of York; and that the mayor and commonalty, on behalf of the inhabitants of the said city, had requested that the said proviso might be repealed. And by the statute 2 & 3 Ann. it is enacted, that the said proviso, as far as the same concerned the citizens of the city of

York, shall be repealed; so that it shall be lawful for all and every the citizens of the city of York, who shall be free-men of the said city, inhabiting therein, or within the suburbs thereof, by their last wills and testaments, to dispose of their goods, chattels, and other personal estate, to such persons as they shall think fit, as any other persons inhabiting within the province of York, may lawfully do by virtue of the statute 4 W. & M.

and other relations to the contrary are totally barred. So that now, throughout all the kingdom of England, a man may devise the whole of his chattels as freely as he formerly could any part thereof^c. But in case of intestacy, the statute of distribution expressly excepts and reserves the customs of the city of London and province of York. So that although the restraint of devising is removed by the statutes just mentioned, yet the ancient customs of London and York remain in full force with respect to the estates of intestates^d. And by the custom of the city of London, there is still a difference to what it is in most other parts of the kingdom in respect to the disposing the care of children^e: as by statute 12 Car. II. c. 24. any father under age, or of full age, may by deed or will dispose of the custody of his child, either born or unborn, to any person, except a popish recusant^f either in possession or reversion, till such child attains the age of twenty-one years. But if the father is a freeman of London, he cannot devise the disposition of the body of his child; and if he doth, yet the infant shall remain in the custody of the mayor and aldermen^g, who are guardians to the children of all freemen of London that are under the age of twenty-one at the time of their father's decease^h. So that if a freeman or free-woman die, leaving orphans within age unmarried, the court of orphans, which is held by custom time out of memory, before the lord mayor and aldermen of the city of London, shall have the custody of their body and goods; and the executors or administrators shall exhibit inventories before them, and become bound to the chamberlain to the use of the orphans, to make a true account upon oath; and if they refuse, they may be committed till they become boundⁱ: And their being bound in the spiritual court doth not excuse them from this custom^k, as they may still be compelled to give other security to the chamber of London^l. And if any person intermarry with an orphan, without the consent of the court, such person may be fined by them, according to the quality and portion of the orphan; and unless such person pay the fine, or give security to pay it, they may commit him to

^c Black. Com. 2 V. 493.

^d *Ibid.* 518.

^e Co. Litt. 88.

^f Popish recusants, are those convicted in a court of law of not attending the service of the church of England, and are thereby subject to divers penalties; or those refusing to make the declaration against popery, as en-

joined by the statute 30 Car. II. c. 2. when tendered by the proper magistrate, by which they are also subject to divers disabilities. Black. Com. 4 V. 56.

^g Priv. Lond. 287.

^h *Ibid.* 288.

ⁱ *Ibid.* 280. 287.

^k Law of Exec. 252.

^l 1 Roll's Abr. 550.

Newgate, to remain there till he submit to their orders^m. A peer has no privilege for taking and marrying an orphan of London without licenceⁿ. — He that marries an orphan without consent of the court, must make a jointure before he receives the portion^o. — Upon the marriage of orphans, the custom is to appoint the common serjeant to treat and take security for the orphan^p.

As to intestacy, in the main the customs of London and of York agree; but there are some variations, and in two principal points they considerably differ. The one is, that in London the share of the children (or orphanage part) is not fully vested in them till the age of twenty-one, before which they cannot dispose of it by testament^q; and if they die under that age, whether sole or married, their share shall survive to the other children^r. The other is that in the province of York; the heir at common law, who inherits any land, either in fee-simple or fee-tail, is excluded from any filial portion or reasonable part^s. — As those variations will appear more conspicuous hereafter, we shall now proceed to take a view of these customs under two distinct heads.

SECTION THE SECOND.

THE CUSTOMS OF THE CITY OF LONDON AS TO INTESTACY.

IF a freeman of London dies in London, or elsewhere, *intestate*, and though his estate doth not lie in the city, but elsewhere, his children are entitled to their share of his personal estate by the custom^t. And if the freeman dies, leaving a widow and a child or children; his personal estate (after his debts are paid, and the customary allowance for his funeral, and for the widow's chamber^u are deducted thereout) is by the custom of the city, to be divided into

^m Priv. Lond. 282, 283.

ⁿ Lev. 163.

^o Priv. Lond. 286.

^p Laws of Lond. 67.

^q 2 Vern. 558.

^r Prec. Cha. 537.

^s Swinb. 231.

^t Priv. Lond. 288.

^u The widow's apparel, and furni-

ture of her bedchamber in London is called the widow's chamber. Black. Com. 2 V. 518. In a case before lord Parker, it was said that the widow is intitled to the furniture of her chamber; or, in case the estate exceeds two thousand pounds, then to fifty pounds instead thereof. Case of Briddle and Briddle, 7 Vin. Abr. 200.

three equal parts, and disposed of in the following manner; to wit, one-third part thereof to the widow, another third part to the children, and the other third part (being taken out of the custom) is now, by the statute 1 Jac. II. c. 17. made subject to the statute of distribution; and so dividing the whole into nine parts, four ninths belong to the wife, and five ninths to the children^w. And if a man dies worth 1800l. leaving a widow and two children, the estate shall be divided into eighteen parts, whereof the widow shall have eight, six by the custom, and two by the statute, and each of the children five, three by the custom, and two by the statute: if he leaves a widow and one child, she shall still have eight parts as before, and the child shall have ten, six by the custom, and four by the statute^x. And if there should be an after born child, such child will come in with the rest for a customary share of the father's personal estate^y. If the freeman leaves a widow, and no child, the widow shall have three-fourths of the whole; two by the custom, and one by the statute, and the remaining-fourth shall go by the statute to the next of kin^z. If he hath no wife, but hath children, the half of his personal estate belongs to his children, and the other half (being, as it is called, the dead man's part; because formerly the ordinary, or he to whom the ordinary committed administration, was to dispose of the same to pious uses for the benefit of the deceased's soul), is now distributable amongst the children by the statute^a. And if he hath neither wife nor child at the time of his death; then the whole belongs to the deceased, and is distributable by the statute^b. As to the freeman's grandchildren, the custom does not extend to these, as hath been determined in several cases^c.

HERE it may be necessary to observe the situation the widow must be in at the time of her husband's death, that she may be intitled to his personal estate; as, whether there is any settlement whereby she may be barred of her customary part, or the part she may be entitled to under the statute of distributions; and also the situation the children must be in that they may be intitled; as, whether any of them have been advanced, so as thereby to be barred in part or in whole of what they would otherwise be intitled to: which, after being considered, more will be said concerning the distribution.

^w 2 Salk. 426. L. Raym. 1328.
^x Vern. 180.

^y Black. Com. 2 V. 518.

^z Prec. Cha. 499.

^a Black. Com. 2 V. 519.

^a 1 P. Will. 341.

^b Law of Test. 196.

^c 1 Vern. 397. 1 P. Will. 341.
 2 Salk. 426.

If the wife be provided for by a jointure before marriage, in bar of her customary part, it puts her in a state of non-entity with regard to the custom only; but she shall be entitled to her share of the dead man's part under the statute of distributions, unless barred by special agreement^d; and if a freeman of London makes a jointure on his intended wife, and the same is expressed to be in bar only of her dower, or thirds of lands, tenements, and hereditaments, this shall not bar her of her customary share of his personal estate^e: yet it is otherwise, if it is said to be in bar of her customary part^f. In respect to the part she will be intitled to under the statute of distributions; where a freeman whose wife has been compounded with dies intestate, his widow shall have such part as she is intitled to under the statute of distributions, if there are no express words in the agreement to exclude her^g: but where a widower and widow being about to intermarry, and having only personal estate; by articles made before marriage, agreed, that in case the husband survived, he should have two thousand pounds only of his wife's personal estate, and the rest to be at her disposal, &c. and in case the wife survived, then she was to have two thousand pounds out of the husband's personal estate, without saying *only or no more*. The husband, being a freeman of London, died; and his wife brought her bill for an account of his personal estate over and above the two thousand pounds, and so to be let into the customary share thereof; but it was decreed, that the equitable construction of those articles must be to exclude the wife from any further share out of the estate; and, though the words were not so full to exclude her, yet the intent of the articles appearing to be a mutual reciprocal agreement between them for settling each other's claim, ought not to be extended larger on one side than the other, and decreed that the wife must have only the two thousand pounds^h.—Where a freeman of London, who was a widower, and had several children, being possessed of a considerable leasehold estate, on a second marriage conveys these leases in consideration of 2000l. portion in trust for himself for life, remainder to his wife for life, *in lieu and bar of all dower, customary estate, &c.* remainder to the first son of that marriage, and so to every other son; and in the settlement there was an

^d Black. Com. 2 V. 519.

^e Eq. Caf. Abr. 158, 159.

^f 1 P. Will. 530.

^g Prec. Cha. 317.

^h Laws of Lond. 102.

agreement

agreement that the trustees should sell these leases, and invest the money in the purchase of lands of inheritance to be settled to the uses aforesaid; but the husband died before any purchase made, and it was held that the wife was barred from claiming any other part of the personal estate^l. And where a settlement was made on the wife of a citizen, of part of the personal estate of the husband, in bar and satisfaction of all her claim and demand out of his personal estate, *by the custom or otherwise*, and the husband died intestate; it was decreed that the wife was barred of her distributive share of his estate by the statute of distributions^k.

HENCE we may perceive, that if there are sufficient words in a settlement made previous to marriage, the freeman's wife will be barred of the claim she might otherwise have to her husband's personal estate, either by the custom or by the statute of distributions; in consequence of which it will be as if there were no wife, and the children will have one half by the custom, and the other half by the statute^l. And if the wife be divorced for adultery, she shall not have her customary share^m.

If any of the children are advanced by the father in his lifetime with any sum of money (not amounting to their full proportionable part), they shall bring that portion into hotchpot with the rest of the brothers and sisters, but not with the widow, before they are entitled to any benefit under the custom: but if they are fully advanced, the custom entitles them to no further dividendⁿ. — The advancement must be of money or personal estate; for the custom extends only to the personal estate of a freeman; because when it first began, the citizens of London had no regard at all to a real estate, as they did not suppose any freeman of London would purchase such estate, but would employ his whole fortune and stock in trade for the benefit of commerce^o. So a settlement of a real estate on a child is no advancement, nor to be brought into hotchpot^p; and if a citizen conveys to a child land of inheritance, though it be expressed for advancement, it bars no child's part; but such may come in for a share of the personal

^l Eq. Cas. Abr. 153.

^k Case of Badcock and Stanhope,

7 Vin. Abr. 211.

^l 1 P. Will. 644. 2 P. Will. 527.

^m Bunb. 16.

ⁿ Black. Com. 2 V. 519.

^o Abr. Eq. Cas. 130.

^p 1 Cha. Cas. 169.

estate with the rest^q. And it has been certified, that where an heir or co-heir had a real estate settled on him or her the same was out of the custom of the city of London; and though the father should afterwards declare the same to be a full advancement for such child, yet that was no bar to his orphanage part; neither was it to be brought into hotchpot, but was clearly out of the custom^r. And where money was given by the father to be laid out in land to be settled on the son and the intended wife for their lives, with remainders in tail; and the question was, whether this should be reckoned to be an advancement by part of the personal estate of the father, so as the son ought to bring the same into hotchpot, to entitle him to a share of the personal estate? it was held by the lord chancellor, that this money was not to be reckoned as part of the personal estate^s.

How this advancement is to be bestowed, and what shall be deemed an advancement either in part, so that the child must bring the same into hotchpot before he be intitled to any benefit under the custom; or in whole, so as thereby the child will be excluded from having any further portion, seems to have been much questioned. Though it is said, generally, by a late author, that any provision made by the father in his lifetime for his children, is advancement within the custom; but that a settlement of a real estate on a child is no advancement, nor to be brought into hotchpot^t. Yet small inconsiderable sums occasionally given to a child cannot be deemed an advancement, or part thereof; neither is maintenance money, or an allowance made by a freeman to his son at the university, or in travelling, &c. to be taken as any part of his advancement; this being only his education, and it would create charge and uncertainty to enquire minutely into such matters. So putting out a child apprentice is no part of his advancement, for it is only procuring the master to keep him for seven years instead of the parent^u.

It is questioned by Mr. Vernon, whether only the provision made on the marriage of a child, or in pursuance of a marriage agreement is an advancement^v; and where 400l. were given to a daughter long after her marriage, and with-

^q 2 Cha. Caf. 160.

^r 1 Vern. 216.

^s Case of Annand and Honeywood,

1 Vern. 345.

^t Law of Test. 205.

^u Laws of Lond. 82.

^v 1 Vern. 89.

out any agreement that the same should be for her marriage-portion; the lord chancellor was of opinion, that it could not be any advancement, unless it had been given her as a marriage portion, or in pursuance of a marriage agreement^x. — Upon a reference to the recorder of London by the lord chancellor, to certify what is the custom of London concerning the advancement of children by their father; it was certified, that by the laws and customs of the city, if any freeman's child be married in the lifetime of his or her father, by his consent, and not fully advanced to his full part or portion of his father's personal or customary estate, as he shall be worth at the time of his decease; such freeman's child, so married, shall be excluded and debarred from having any further part or portion of his or her father's personal or customary estate, to be had at the time of his decease; except such father, by some writing by him written and signed with his name or mark, shall declare and express the value of such advancement: and then every such child, after the decease of his father, producing such writing, and bringing such portion so had of his father into hotchpot, shall have as much as will make up the same a full child's part or portion of the customary estate which his father had at the time of his decease; notwithstanding such father shall, by any writing under his hand and seal, declare such child was by him fully advanced^y. — It is said to be sufficient, if the freeman declare the advancement by any writing under his hand, or by any thing written by him, although it be in an almanack, or elsewhere^z. But in the case of *Dean* and lord *Delaware*, the father's declaring, that the child was fully advanced or not advanced, was of no avail, unless it appeared what the advancement was in certainty; to the intent that it might be known, whether such advancement did amount unto as much as would have belonged to the child by the custom^a. And in a case where a freeman had advanced his child on marriage, and the certainty of that advancement did not appear under the freeman's hand; it was adjudged a full advancement, and that the freeman's declaration alone that he had advanced his child, was not of itself sufficient^b.

^x 1 Vern. 61.^y L. Raym. 484. Eq. Caf. Abr. 155.^z Green's Privil. Lond. 53.^a H. 1708. 2 Vern. 630.^b Case of Cleaver and Spurling, T. 1729. 2 P. Will. 327.

THE child of a freeman of London, when of age, may in consideration of a present fortune, bar herself of her customary part; as where the father, on his daughter's marriage, agreed to give her 3000l; which she being of age, covenanted to receive in full of her customary share as a freeman's daughter: and though it was objected, that such a future right cannot be released, and that parents might make an ill use of the power they have over their children, in forcing them to give such discharges; yet this was held a good bar of the custom, there being no fraud in the transaction^c. But such release, without a valuable consideration, is not good; for in such case, at the time of the release, the children having neither *jus in re* nor *jus ad rem*, that is, neither right in the thing nor right to the thing, the whole being in the father during his life, there is nothing for any release to operate upon^d. — If a man who is of age, marries a freeman's daughter who is under age, he may bar himself of any future right that he might have to the freeman's customary estate by virtue of such marriage; as where a freeman of London had two daughters and one son; one of the daughters married, and on receiving a suitable portion, the husband released all right and interest which he had or might have to any part of the father's personal estate by the custom or otherwise; and covenanted, that at any time after the death of the father, he would do any further act for the releasing of any right which he might have by the custom. Jekyll and Gilbert, commissioners, inclined to think, that the release being for a valuable consideration, purporting an agreement to quit the right to the orphanage part, to be binding in equity; but though this might not be so clear, yet the covenant for a valuable consideration to release the future right is good; and so they decreed on the execution of the release^e. Where the husband and wife, in consideration of 2000l. the wife's marriage portion, covenanted to release all the right and interest that might accrue to them out of the father's personal estate by the custom of the city of London, and a bill was brought to have a specific performance of the articles made on the marriage. The defence made for the defendant was, that the customary part being a mere possibility and contingency, which might or might not happen, it could

^c 2 Eq. Cas. Abr. 271. Str. 947.

^e 2 P. Will. 272.

^d 1 Atk. 402.

not be released; and if it could, that at the time of the articles the wife was an infant, and so not bound by them; besides, that the 2000l. was no consideration for releasing such an interest, the wife's father having died worth upwards of 20,000l. By lord chancellor Hardwicke. These considerations are too loose either for a judge at law, or in this court, to lay any weight upon; and I must determine according to the facts, by the rules of law, and of this court. In this case there appears to have been a valuable consideration for the agreement in the articles, because at the time when the 2000l. were given, the defendant's wife was intitled to no part of the estate of her father; and it was given for her advancement in the world; and it is highly reasonable that such kind of articles should be carried into execution, and that when a father is bountiful to his children in his lifetime, he should have his affairs settled to his own satisfaction. As to the objection of the customary part being a possibility, and merely in contingency, it is of no weight; for there is no doubt but it might be released in equity: but here is a covenant, which the defendant is bound by in all events. And it is no objection to say, that the wife was under age; for though in this respect, if the husband were dead, the articles would not bind her, and she would by survivorship be intitled to the customary share, as a chose in action not recovered or received by the husband; yet he being alive, it is a matter that accrues to him in right of his wife; and he may release it, and his release will bind her; and therefore it was reasonable he should perform his covenant. I found my opinion too on an old law well known in the city, by the name of Jud's law; whereby a husband was authorized to agree with the father for the wife, though she was under age^f.

As to children partly advanced, bringing their advancement into hotchpot; we may observe as has been mentioned^g, that it is to be brought in among the brothers and sisters only, but not with the widow: for it has been determined to be beyond all doubt, that where a child that had a portion, but was not fully advanced, but was to bring her portion into hotchpot, that the portion should not be

^f Case of Medcalf and Ives. 1 Atk. 63. ^g Pag. 106.

brought into the personal estate in general, so that the widow might come in for part of it, but that it should be brought into the orphanage part only^b. And where a freeman of London hath but one child, and he hath received some portion from his father, and the father dies leaving this child and a wife; the child shall have his full orphanage part, without any regard to what he hath already received^c. And where an only child is in part advanced by the father in his lifetime, such child shall not bring his portion into hotchpot, there being none in equal degree with him^d. The only meaning of bringing the child's share into hotchpot is, to make an equality among the children, and not for the benefit of the mother^e.

If a freeman having several children, or but one child, doth *fully advance* all his children, or his single child; this satisfies the custom, and is the same as if he had no child, and his personal estate shall go as if there was none^m, and the wife shall have a moietyⁿ or one half; which must be understood to be a moiety or one half by the custom, from which the children, or one child, being advanced are excluded. So consequently, it seems, that the other moiety or one half, must fall under the direction of the statute of distributions, and be distributed as the statute directs.

THE custom, it may be observed, extends only to the wife and children; whereas, if there is neither wife nor child living at the intestate's death, the whole of his personal estate is subject to the statute of distribution, as has been mentioned^o, and consequently must be distributed in the same manner as was shewn in a former chapter^p.

BESIDES what has been mentioned, concerning how distribution is to be made where the freeman leaves a wife, child, or children; and as we have now seen that the wife may be barred by settlement, and the children by being advanced; we may here observe, that the course of distri-

^b 1 Vern. 345.

^c 2 Salk. 426.

^d 2 Vern. 234.

^e 2 P. Will. 526.

^m *Ibid.* 527.

ⁿ 2 Vern. 663.

^o Pag. 104.

^p Chap. 3.

bution of the personal estate of a freeman of London seems to be thus :

IF the freeman dies intestate, leaving no wife, but an only child ; which child is advanced, or partly advanced, or not advanced ; in all these cases it makes no difference, for one way or other such child shall have the whole clear personal estate. For supposing such child is advanced ; he shall have nothing by the custom, but by the statute he shall have the whole as next of kindred. If he is partly advanced ; he shall have one half by the custom, there being no other child with whom to bring his partial advancement into hotchpot, and the other half by the statute. So in like manner, if he is not at all advanced ; he shall have one half by the custom, and the other half by the statute.

IF the freeman leaves no wife but divers children ; as suppose them to be three, the first of which is advanced, the second partly advanced, and the third not advanced : in this case the child partly advanced, and the child not advanced, shall have one half equally betwixt them by the custom ; the child partly advanced first thereunto bringing his partial advancement into hotchpot ; and the other half (which is called the dead man's part) shall be distributed by the statute equally between those two children, the first child being supposed to be fully advanced already.

As to the representatives of children dead ; those we must observe, are admitted by the statute to a distributive share of the dead man's part, in the place of the deceased child or children whom they represent ; but not so of the customary part by the custom.

IF the freeman leaves a wife, and no child ; she shall have, besides her chamber, one half by the custom, and the other half (being the dead man's part) shall be distributed by the statute ; of which dead man's part by the said statute she shall have one half : so that dividing the whole personal estate into four parts, she shall have three, and the next of kindred one. But although there

there be no child of the freeman's living at his death; yet if there hath been a child, and there are any legal representatives of such child, that is, lineal descendants; then of the dead man's part by the statute, the wife shall have but one-third, and the representatives shall have the other two-thirds: so that dividing the whole personal estate into six parts, she shall have four, and the representatives two.

If the freeman leaves a wife, and also a child or children, any one or more of which children are not advanced; by the custom she shall have one-third part, and the children not advanced shall have another third part, and the remaining third part (being the dead man's part) shall be distributed by the statute; of which dead man's part by the said statute she shall have one-third, and the other two-thirds shall be distributed amongst the children: so that dividing the whole into nine, she shall have four, and they shall have five. But if the wife be barred by settlement, whereby it may be as if there were no wife; then the children will have one half by the custom, and the other half by the statute as hath been mentioned^q.

THE orphanage share not being fully vested in the children till they attain the age of twenty-one, a child entitled to an orphanage share of his father's personal estate dying under twenty-one, cannot devise it by his will; for by the custom it survives to the other children, as hath been mentioned^r. But a child may devise the share which he hath by the statute of distributions^s; and that at the age of fourteen, if a male, and twelve, if a female; provided he or she be of sufficient discretion; as it seems expressly laid down by Sir William Blackstone^t; and his reason given for it is, because that is the rule of the civil law, and that as the ecclesiastical court is the judge of every testator's capacity, this case must be governed by the rules of the ecclesiastical law: so that as the learned author says, no objection can be admitted to the will of an infant of fourteen merely for want of age; but if the testator was not of sufficient discretion, whether at the age of fourteen or four-and-twenty, that will overthrow his testament.

^q Pag. 106.

^r Pag. 103.

^s 2 Vern. 559.

^t Com. 2 V. 497.

SECTION THE THIRD.

THE CUSTOM OF THE PROVINCE OF YORK
AS TO INTESTACY.

WE have already seen, that here, as well as in the city of London, a man may by will dispose of the whole of his personal estate to whom he thinks fit, and that the claims of the widows children and other relations to the contrary are totally barred^u. But as to intestacy; if a man being an inhabitant or an householder within the province of York, and dying there or elsewhere intestate, and at the time of his death hath a wife, and also a child or children; his goods (after paying his debts, and deducting the widow's apparel and furniture of her bed-chamber^w), shall be divided into three parts; whereof the wife ought to have one part, the child or children another part, and the third part (which is called the death's or dead man's part) is distributable by the statute; of which dead man's part, by the statute, the wife shall have one-third, and the other two-thirds shall be distributed amongst the children: so that dividing the whole into nine parts, the wife shall have four and the children five; in like manner as has been said concerning the custom of the city of London^x. But if by settlement a jointure is limited to the wife, in bar of all her demands out of the personal estate of her husband by virtue of the custom, in such case it is as if there were no wife with respect to the customary part; so, if it is in bar of all her demands, by virtue of the said custom *or otherwise*, she shall be debarred also of any distributive share by the statute^y. And as to the children; if the intestate hath a wife, and a child or children, which child is heir to the intestate, or which children were advanced by the father in his lifetime; in this case it is as if he had no child: and therefore his goods shall be divided into two parts;

^u Pag. 101.^w By the general and ancient custom of the province of York, widows have been tolerated to reserve to their own use, not only their apparel and a convenient bed, but a coffer with divers things therein necessary for their own persons; which things have been usu-

ally omitted out of the inventory of their deceased husbands goods, unless the husband was so far indebted, as the rest of his goods would not suffice to discharge the same. Swinb. 422.

^x Pag. 104.^y 1 Vern. 15.

whereof

whereof the wife is to have one part to herself, and the other half is distributable by the statute^z, as we shall see more of hereafter.—If the intestate hath neither wife nor child at the time of his death, his whole personal estate (the funeral expences, and other necessary charges being first deducted), shall be disposed of in due course of administration, as now falling under the direction of the statute of distribution^a; and consequently must be distributed in such manner as was shewn in a former chapter^b.

As to the child's being excluded as being heir; this, we may observe, is one of the main points wherein the custom of the city of London and province of York differ; as in the former, whatever real estate the child has, either by descent from his father, or conveyed to him by his father in his lifetime, it will in no wise bar the child from receiving his share of his father's personal estate; whereas here he will be totally barred from receiving any part thereof *by the custom*, if he should have any real estate by descent, or otherwise, from his father. For here not only the heir of lands holden in fee-simple is thereby barred from the recovery of a filial portion, but he also that is heir in fee-tail, either general or special^c: and although the lands be of very small revenue, perhaps not more than a noble yearly rent, and the goods very great in comparison of so small a rent (as may be 1000*l.* or more); even in this case the heir is barred from the hope of a filial portion^d: and not only that heir is excluded from a filial portion who doth enter upon the land immediately after his father's death, but he also who is heir in reversion, is heir; and being heir, can have no filial portion: so by this it may fall out very hard with the heir in reversion; for if he should

^z Swinb. 220.

^a *Ibid.*

^b Chap. 3.

^c Estates tail may be either general;—or general to male or to female;—or special;—or special to male or to female. Tail general is, where lands and tenements are given to one, and the heirs of his body begotten. By which manner of bequeathing, how often soever the donee in tail marries, his issue by every such marriage is in successive order capable of inheriting the estate tail *per formam doni*, that is, by the form of the gift. If lands are given to a man, and the heirs male of his body begotten, it

creates an estate in tail male general: and *vice versa*, an estate tail female general. Tenant in tail special is, where the gift is restrained to certain heirs of the donee's body, and does not go to all of them in general. As where lands and tenements are given to a man and the heirs of his body, on Mary his wife to be begotten; hereby no issue can inherit, but such special issue as is engendered between them two; not such as the husband may have by another wife; and therefore it is called special tail. Black. b. 2. c. 7.

^d Swinb. 231, 232.

die in the mean time, before he could lawfully enter to those lands which be his only in reversion, he could reap no benefit either of his father's lands or goods; yet he must be content with his lot, and though not he, but his shall enjoy the land at the time appointed^e. And although the heir receive the land by settlement made upon his father's marriage; yet he is heir so as to be excluded thereby from a filial portion; as where the father having by settlement on his marriage settled his real estate to himself for life, part to his wife for her jointure, and the remainder of the whole to his first and other sons in tail, remainder to his own right heirs; the eldest son was thereby excluded *by the custom of the province of York* from having any share of his father's personal estate^f. And if the heir hold lands by deed of feoffment^g in mortgage, or with clause of redemption; that is to say, upon condition that if the feoffor pay unto him a sum of money at a certain day, that then the feoffor may re-enter, and the deed or grant be void; yet in the mean time, until the condition be performed, and the land redeemed, if he should demand any filial portion he is barred; because as yet he is heir to the deceased. But if the lands should be redeemed, and the money satisfied, then it is thought that he may recover a filial portion; because then he is not heir to the deceased, nor the advancement certain which was made by the father in his lifetime^h.

HAVING thus seen how the heir may be barred from receiving a filial portion by having lands from his father by descent or otherwise; we come now to consider what advancement will bar a child from receiving a filial portion. But before we proceed with this, we may here just take notice, that what has been said concerning the heir being barred, relates solely to his being barred of what he would be intitled to by the custom, and not what he will be intitled to by the statute; which we shall perceive by what will be said hereafter.

^e Swinb. 231.

^f Case of Constable and Constable.

² Vern. 375.

^g A feoffment, or deed of feoffment, is the ancient method of conveyance. Black. Com. 2 V. 310. Yet since the statute of 27 Hen. VIII. c. 10. of uses, the conveyance by lease and release has taken place of it, and is become a very

common assurance to pass lands and tenements; for it amounts to a feoffment, the use drawing after it the possession without actual entry, and supplying the place of livery and seisin required by the deed of feoffment.

² Ven. 35.

^h Swinb. 232.

As concerning the advancement, whereby a child may be barred from receiving a filial portion; this advancement must be by the father in his lifetime. For although another bestow any advancement, be it as much as it may, this preferment by another is no bar to the child from the recovery of a filial portion of his father's goods; much less where the child hath advanced his estate by his own industry^l. And if the father bestow any thing upon another for his child's sake, or for the good of his child; this is no such preferment as will hinder a child of his filial portion^k: and therefore if the father bestow any thing upon a man of trade, to take his son for an apprentice, and to teach him his mystery, this is no advancement to the effect aforesaid^l; or if the father bestow any thing upon a schoolmaster, or tutor in the university, for the increase of his child's knowledge in learning, or for any degree there to be obtained; this is no advancement to exclude the child of a filial portion^m.

THE advancement must be a provision made by the father of some competent thing for the maintenance of his child, whereby he may be the better enabled to live after his father's death; for if the father bestow any thing upon his child to any other end, as money in his purse to spend among his equals, or to buy him suits of apparel or books; yet this is not to be holden for an advancementⁿ.—If a portion be given to a child in lieu and satisfaction of a filial portion, and the child be of age, and in consideration thereof doth release his future filial portion; then the child will be barred of any future claim: as a child when of age, for a valuable consideration may release his future filial portion^o.—If the father in his lifetime bestow a lease upon his child, or grant unto him an annuity for life out of his lands, though it be in such manner as the child shall not reap any benefit thereby, so long as the father lives, but after his death; this is holden for a preferment or advancement; because it was assured unto him in his father's lifetime^p. And if the father bestow a competent portion with his daughter in marriage upon him that shall marry her; this is such an advancement as will bar her from a demand of a filial portion^q. By the word portion is to be understood, not only a sum of money, or part of the father's goods and chattels; but also lands and annuities bestowed by the father upon the son^r.—Competent, signi-

ⁱ Swinb. 233.

^k *Ibid.*

^l *Ibid.*

^m *Ibid.*

ⁿ *Ibid.* 234.

^o 4 Burn's Eccles. Law, 395.

^p Swinb. 234.

^q *Ibid.*

^r *Ibid.*

fies equal, or not far inferior to that quantity which otherwise, according to the custom of the province, should fall to be due to the child, after the rate and proportion of the father's estate, at the time when he doth bestow any such thing upon his child; for the same being equal, or not much under the rate which should belong to the child by the custom, if his father had then died, shall stand for a sufficient preferment and advancement to exclude him from a filial portion^s.

It seems since Swinburn's days generally to have prevailed as the custom of the province of York, that children (exclusive of the heir at law) not advanced to their full proportion of the children's part, shall be admitted to come in for their share of the said children's part, bringing thereunto their partial advancements into hotchpot: agreeable to what Swinburn acknowledgeth to be the rule of the civil law; in conformity also to the custom of London, and to the measures of the statute of distribution, and the rules observed by the courts of equity in all such like cases^t.

WHERE there is a wife, child, or children, the course of distribution of intestates effects within the province of York seems to stand thus:

IF a person dies intestate, leaving no wife, but an only child, which child is heir at law, or advanced, or partly advanced, or not advanced; in all these cases it makes no difference; for one way or other such child shall have the whole clear personal estate. For supposing such child to be heir at law; he shall have nothing by the custom, but by the statute he shall have the whole as next of kindred. If he is advanced; he shall likewise have nothing by the custom, but by the statute in like manner he shall have the whole. If he is partly advanced; he shall have one half by the custom, there being no other child with whom to bring his partial advancement into hotchpot; and the other half by the statute. So in like manner, if he is not at all advanced; he shall have one half by the custom, and the other half by the statute.

^s Swinb. 234.

^t 4 Burn's Eccles. Law, 403.

If such person hath divers children; one of whom is heir at law, and the others are advanced; in this case, with respect to the custom, it is as if he had no children: none of them can claim any thing by the custom; and (the younger children being supposed to be fully advanced) the heir at law by the statute shall have the whole. So here we may observe, as before hinted^u; that as to the custom the heir at law is barred by having lands; yet by the statute he is in no wise barred by any lands that he may have had by descent or otherwise from the intestate; which we have seen in a former chapter^w.

If such person hath divers children, the first of which is heir at law, the second advanced, the third partly advanced, and the fourth not advanced; in this case, the child partly advanced, and the child not advanced, shall have one half equally betwixt them by the custom, the child partly advanced first thereunto bringing his partial advancement into hotchpot; and the other half (which is the dead man's part) shall be distributed by the statute equally amongst all the said children (the second only excepted, who is supposed to be fully advanced already), share and share alike. But if the heir at law hath been advanced by his father, otherwise than by lands, or as heir at law; he shall bring such advancement into hotchpot with his brothers and sisters, otherwise he shall have no distributive share by the statute.

In respect of the dead man's part, which is distributable by the statute; we must observe as to this, that the representatives of children dead are admitted to a distributive share in the place of the deceased child or children whom they represent; but not so of the customary part by the custom.

If a man hath a wife and no child, she shall have (besides her convenient bed and apparel) one half by the custom, and the other half (being the dead man's part) shall be distributed by the statute; of which dead man's part by the said statute she shall have one half, and the other half shall go to the next of kindred to the deceased in equal degree: so that dividing the whole into four parts, she shall have

^u Pag. 116.

^w Chap. 3. pag. 67.

three, and they shall have one. But in respect to the dead man's part, although there be no child, yet if there hath been a child, and there are any legal representatives of such child deceased; then of the dead man's part by the said statute, the wife shall have but one-third, and the representatives shall have the other two-thirds: so that dividing the whole into six parts, she shall have four and they shall have two.

If a man hath a wife, and also a child or children, one of which children is heir at law, and the others are advanced; in this case, with respect to the custom, it is the same as if he had no child; and consequently the wife shall have one half by the custom, and the other half (being the dead man's part) shall be distributed by the statute; of which dead man's part, by the said statute, she shall have one-third, and the other two-thirds shall go to the heir at law: so that dividing the whole into six parts, she shall have four, and he shall have two.

If a man hath a wife, and also a child or children, any one or more of which children are not advanced; by the custom she shall have one-third part, and the children not advanced shall have another third part, and the remaining third part (being the dead man's part) shall be distributed by the statute: of which dead man's part, by the said statute, she shall have one-third, and the other two-thirds shall be distributed amongst the children; so that dividing the whole into nine, she shall have four, and they shall have five.

To illustrate this, let us here for example suppose a man inhabiting within the province of York dies intestate, leaving a clear personalty of 9000l; and leaving a widow and four children; the first being heir at law to freehold lands, and having received likewise of his father in his lifetime 400l to set him up in trade; the second advanced to the amount of 3000l; the third partly advanced, to the amount of 600l; and the fourth not at all advanced. The question is, How this personalty shall be distributed? First of all, the widow shall have one-third part by the custom, as her widow's portion, to wit, 3000l. Another third part, by the said custom, shall be distributed amongst the children; of which the heir

at law (as such) by the said custom is excluded from recovering any share; the second son also, as being fully advanced, is excluded; but hereunto the third son shall bring his partial advancement of 600l into hotchpot, and then the third and fourth sons shall divide the 3600l equally between them; but the real benefit thereof to the third son will be but 1200l and to the fourth son 1800l. The remaining third part of the said personalty, which is the dead man's part, shall be distributed by the statute; of which, by the said statute, the widow shall have one-third, to wit, 1000l; and the residue, being 2000l, shall be distributed equally amongst the said three children, viz. the heir at law, and third and fourth sons (the heir at law being let in for so much by the statute; and the second son being still excluded, as having received more than his just proportion of his father's whole personal estate); but hereunto the heir at law shall first bring his partial advancement of 400l into hotchpot, and so the said three children shall divide the whole 2400l equally amongst them; but the real benefit thereof to the heir at law will be but 400l, and to the said two younger children 800l each. So that of the whole clear personalty of 9000l, the widow shall have 4000l, the heir at law 400l, the second child nothing, the third child 2000l, the fourth child 2600l; which added together makes the 9000l^x. But if by settlement a jointure is limited to the wife, in bar of all her demands out of the personal estate of her husband, by virtue of the custom or otherwise, she will be debarred of any share, either by the custom or statute; and in such case it will be as if there were no wife, as has been mentioned^y; and consequently the children must have the whole.

By this custom, the customary share which the children are intitled to, vests in them immediately on the intestate's death; quite different to the customary share which the children of a freeman of London are intitled to by the custom of London, which does not vest in them till they are twenty-one years of age; wherefore, until they attain that age they cannot dispose of it by will; and if they die under that age their share survives to the other children, as has been mentioned^z. But here, as the customary share vests immediately on the in-

^x 4 Burn's Eccles. Law, 407.

^z Pag. 103.

^y Pag. 114.

testate's death, as doth the share the children are intitled to by the statute of distribution; so that the whole is vested in them immediately on the intestate's death, and being so vested, in case either child dies under age, and without will, the share of such child will fall under the statute of distribution, and go according to the course of distribution treated of in a former chapter^a. And if the infant be of the age of fourteen, if a male, or twelve, if a female, he or she may dispose thereof by will; as has been before mentioned concerning what an infant is intitled to by the statute of distribution^b.—That a male infant may make a will, and thereby dispose of his goods and chattels at the age of fourteen, and a female at the age of twelve years, seems generally so to be allowed as not to admit of a doubt; provided they be of sufficient discretion. But as to real estates, by the statute 34 & 35 Hen. VIII. c. 5. sect. 14. wills or testaments made of any manors, lands, tenements, or other hereditaments, by any person within the age of twenty-one years, shall not be good or effectual in law.

WE having now, not only seen that every man is at liberty to make a will, and thereby to dispose of the whole of his personal estate to whom he thinks fit^c, but also that infants at the age of fourteen years, if males, and twelve if females, are by law impowered to make wills, and thereby to dispose of their personal estate: here we may make a few brief observations on the utility of a will, and the benefit the same may be of to a man's family or relations; provided it be made with good advice. And to this end let us first suppose a man to have relations, several of whom may be intitled to the administration of his estate; and he makes his will and appoints one or more executors, and thereby gives his relations his personal estate, just in the same proportion as the law would intitle them thereto in case he had died intestate, and left it to the disposition of the law: now by means of the will, for which some at first sight may be apt to think there was little occasion, much altercation may be prevented; as thereby all disputes and controversies concerning who should have the administration will be totally excluded, no room being left for dispute; and therefore, it is probable very considerable

^a Chap. 3.^b Pag. 113.^c Pag. 101.

expence will be saved; for as we have seen in the first chapter of this book, there may be room for contending who should, and who should not have the administration; and in the second chapter, we may perceive there are many circumstances that might excite those intitled thereto, rigorously to contend for it; which having too often been the case, and the determining who should have the administration attended with such expence and detriment to the parties concerned, as ultimately to render the intestate's personal estate of little or no benefit to them.

NEXT let us suppose a man to die intestate, leaving a wife and several children who are of age, and equally intitled to the administration with their mother; yet all amicably agree to suffer their mother alone to administer their deceased father's estate; and that one or more of those children have been advanced by their father, either in part or to the full amount of their share of his personal estate. Now although those children may all have amicably agreed to suffer their mother to administer, yet it may not only require some consideration for the administratrix to ascertain this advancement, and so to make a just and equal distribution amongst them, pursuant to the statute of distribution; and (if the intestate be a citizen of London, or an inhabitant of the province of York, where the customs interfere with the statute), to make distribution pursuant to those customs and the statute; but it will probably require much more consideration, as well as a deal of pains and trouble for the administratrix, after she has allotted each of those children their lawful share, to convince them that it is the whole each can demand; so that all may be satisfied of justice being done, and thereby be prevented from calling in the aid of counsel, or some person learned in the law; if not the aid of a court of law or equity, to satisfy them respecting their shares of their deceased father's estate: which latter aid having been often required when the former could not satisfy, the consequence hath been, that considerable sums of money have been

been spent in litigation, and that not only to the great loss, but even to the utter ruin of some of the intestate's children; which might totally have been prevented, had he made a will with good advice, as by the assistance of some person sufficiently versed in the law.

AGAIN, let us suppose a man to die intestate, leaving no wife, but a child or children, who may not be of the age the law requires to administer his estate. Here, as concerning the personal estate, the ordinary assigns some person to take care thereof, and to provide for the infant's maintenance and education till he attains fourteen years of age, when he may choose his own guardian^d. Whereas the father might by will have vested his estate in one or more of his judicious friends to have taken care thereof, and to have disposed of it at such times, and in such manner as he should have directed; by which means he would not only have had one or more persons of his own choosing to take care of his estate for his children, and to distribute it to them as he should have directed, but would have saved the expence which the ordinary's appointment is attended with; and perhaps much greater expence, when the children are of proper age, may be occasioned, by calling the person appointed by the ordinary to account.

CONCERNING the utility of a will, and the benefit it may be of to a man's family or relations, much more might be said; as any person who has read only this book may perceive, and thereby see that such advantage may redound to a man's family or relations by a will, as to be convinced that the small expence of employing counsel, or a person sufficiently versed in the law for making it, is not an object to be compared with the hazard of litigation that might be occasioned by a person's dying intestate; and the loss and detriment his family or relations may thereby sustain. — By a will made with good advice, or by the assistance of a person sufficiently versed in the law for making it, the testator's estate may be given and disposed of so as not to leave the least room for dispute or litigation; yet we must observe, that if the will be not made with good advice, it may be attended with as bad consequences as if the testator had died intestate, and left his

^d Black. Com. 1 V. 461. 463.

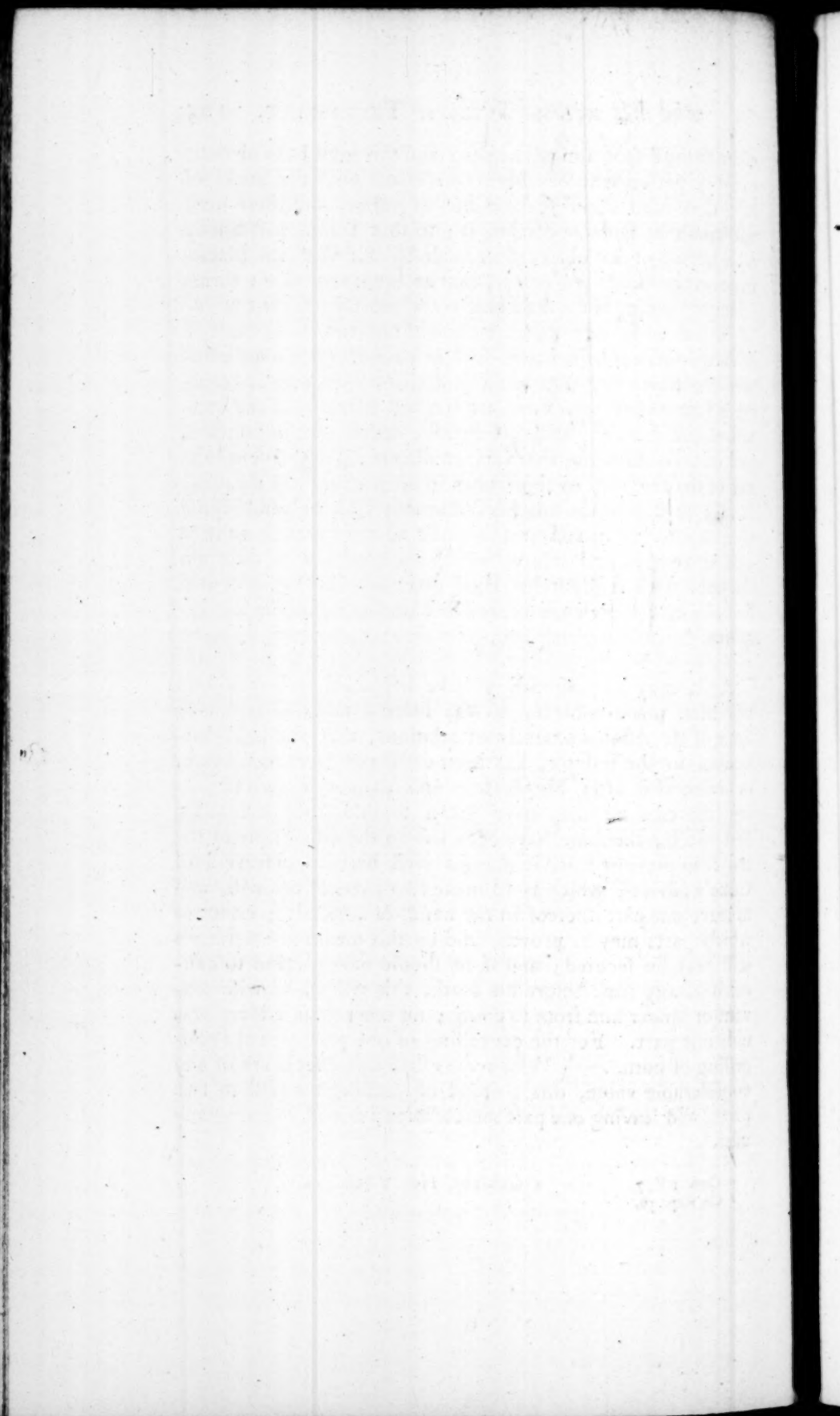
estate to the disposition of the law; and this must be so obvious to every person who has been conversant with the books of report, or hath attended the courts of justice, that there need not much be said concerning it; so that I shall just briefly take notice of an observation made by Sir William Blackstone on this head^e; which is, that an ignorance of the forms which the policy of the laws hath made necessary for the wording of last wills and testaments, and of the attestation, must be of dangerous consequence to such as compile their own testaments without any assistance; and that those who have attended the courts of justice, are the best witnesses of the confusion and distresses that are thereby occasioned in families, and of the difficulties that arise in discerning the true meaning of the testator, or sometimes in discovering any meaning at all; so that in the end his estate may *often* be vested quite contrary to his intentions; because he has perhaps omitted one or two formal words, which are necessary to ascertain the sense with indisputable legal precision, or has executed his will in the presence of fewer witnesses than the law requires.

As it may be presumed to have happened, where a will has been made contrary to the interest and inclination of some of the testator's family or relations, that the same unknown to the testator, has been destroyed before his death, or concealed after his death; and thereby notwithstanding the care he may have taken to dispose of his estate and effects, the same have been left to the disposition of the law: to prevent this, it may be well here to observe lord Coke's advice; which is to make two parts of the will, and to leave one part thereof in the hands of a friend^f; either of which parts may be proved, and by this means the testator's will may be secured; and if he should have a mind to cancel it at any time before his death, this will in no wise prevent or hinder him from so doing; no more than if there was only one part. For the cancelling of one part is as the cancelling of both^g. — Where the estate and effects are of any considerable value, this method of making the will in two parts, and leaving one part thereof with a friend, is commonly used.

^e Com. 1 V. 7.

^f Co. Rep. 36.

^g Gilb. 107, 110. 2 Vern. 742.



I N D E X.

A

- A**CCOUNTING before the ordinary, 15. 61.
Actions may be had by administrators, 2. 43.
— in what cases actions die with the deceased, 22.
— to be brought at common law for the deceased's goods, 23.
Acts done by an administrator good till administration repealed, 50.
Administration, why it should be obtained, 2.
— who are intitled thereto, 2. 5.
— by whom to be granted, 6.
— how void when granted by an improper court, 9.
— how and for what reason it may be revoked, 18.
Administrator, his power, 20.
— his interest in the deceased's goods, 21.
— in what cases he may have the same actions as the deceased might have had, 22. 43.
— may retain a debt due to himself, 27.
— may distrain for rent, 23.
— his office and duty in paying debts, 51.
Adultery, wife barred of dower thereby, 97.
— barred by the custom of London, 106.
Advancement of children, 67.
— what may be given to or bestowed upon a child, yet no advancement, 68.
— what shall be deemed an advancement, 69.
— what may be given to a child, yet no advancement by the custom of London, 106, 107.
— what may be an advancement in part or in whole, 108.
— what may and may not be deemed an advancement of a child by the custom of York, 117.
Aliens not dowable, 97.
— not capable of holding lands, *ib.*

Ancestor,

I N D E X.

- Ancestor, his seisin, whereby his heir may be intitled, 86.
 — binding himself and heirs, real estate thereby liable to his debts, 93.
 Annuity, from what time interest shall be allowed on arrears thereof, 57.
 Appeal, administration suspended thereby, 50.
 Apprentice, interest therein a chattel personal, *ib.*
 — must be provided for, 58.
 Assets, divers kinds thereof, 45.
 — what shall be assets in the administrator's hands to make him chargeable, 45, 46, 47, 48, 49.
 Award, 48.

B.

- Bastard has no kindred, 84.
 Bond to the ordinary on obtaining administration, 14.
 Bonds specialties, and to be paid next to debts of record, 55.
 — heir not to be charged thereby, unless mentioned, 56.
Bona notabilia, 6, 7. 12.
 Borough English lands, heir thereto not to abate in respect thereof, 68.
 — custom of, 100.

C.

- Canons appointing persons exercising ecclesiastical jurisdiction how to act in respect of granting administration, 10. 12.
 Castle built for defence of the realm, widow cannot be endowed thereof, 98.
 Chancery, a bill for distribution properly lies there, 63.
 Charters and deeds belong to the heir, 35.
 Chattels real and personal, 29.
 Child in the mother's womb intitled to a share in distribution, 72. 104.
 Citation, administration repealed thereby, 50.
 Co-executors differ from administrators, 21.
 Co-heiresses, if advanced to abate for the same, 67.
 Collateral kindred, 77.
 Common without stint, widow cannot be endowed thereof, 98.
 Corn sown, to whom it shall go, 30, 31.
 Cost in suits, 44. 62.
 Creditor may have action against heir and devisee, 93.
 Curtesy of England, 94.
 Customs that prevail in certain counties, &c. 99, 100.
 — in the city of London and province of York, 101.

D.

I N D E X.

D.

- Death, if two administrators, and one dieth, the administration survives, 21.
- Debt, action of, 55.
- of paying debts according to their priority, 51.
- Decree in equity equal to a judgment at law, 54.
- Defraud of creditors by administrations granted to a stranger of mean estate, 50.
- Demesne, 24, 25.
- Descent of lands, 86.
- Descendants preferred to all ascendants and collaterals, 74.
- Distribution, time when to be made, 64.
- how to be made among the intestate's wife and children, 66.
- how among children and grandchildren, 72, 73.
- how among the next of kin, 74. 81.
- how among the intestate's wife and children by the custom of London, 103. 113.
- how where there is a widow and no child, 104. 112.
- how where there are children and no widow, 104. 106.
- how among the wife and children by the custom of York, 114. 120, 121.
- how where there is a widow and no child, 119, 120.
- how where there are children and no widow, 119. 121.
- Dower, what is requisite to intitle a wife thereto, 97.
- what may render her incapable thereof, ib.
- cannot be barred but by her own act, 98.
- may be barred by settlement made before marriage, 99.

E.

- Ecclesiastical courts. See spiritual courts.
- Eldest son and his issue to succeed before the younger, 88.
- Emblements, 30.
- Entry not always necessary to give seisin in deed, 94.
- Escheat, 84. 91.
- Estate *pur autre vie* distributable, 30. 49.
- Estates of inheritance and freehold, 28.
- Estate mortgaged must be redeemed for benefit of the heir, 54. 93.

K

Executor

I N D E X.

Executor of his own wrong, 51.

— for what an administrator may be charged as such, 50.

Execution, of two judgments the first that sues execution to be preferred, 53.

Ex-officio, no judge of the prerogative to cite persons thus without sufficient reason, 12.

F.

Father intitled to his child's personal estate, 74, 75.

Fees and expence of obtaining administration, 16, 17.

Fee-simple, 86.

Fee-tail general or special, 115.

Females, how to inherit, 88.

Funeral charges, 51.

G.

Gavelkind, custom of, 99, 100.

Goods and chattels concern the administration, 14.

— administrator interested therein, 21.

Grandchildren to abate for what their father was advanced, 70.

— how intitled to a distributive share, 72, 73.

Guardian, 102. 124.

H.

Half blood intitled to administration, 4, 5.

— to a share in distribution, 71. 75. 83.

— not inheritable, 91.

Heir intitled to his ancestor's estate, 86, 87.

— to a share in distribution of personal estate, 67.

— to things affixed to the freehold, 31, 32.

— to things in nature of chattels, 29, 30. 34, 35.

— favoured by the law in respect to his ancestors debts, 93.

— by the custom of York barred of a filial portion, by having lands by descent or otherwise, 115, 116.

Heir-looms, 34, 35.

Hereditaments incorporeal, 24.

Hotchpot, 67.

Husband intitled to the administration of his wife's goods, 3.

— to his wife's real estate by the curtesy of England, 94.

Husband and wife may convey wife's real estate, 96.

I N D E X.

I.

- Ideot, if wife be an ideot husband cannot be tenant by the curtesy, 95.
- Infants not capable of administering, 5.
- ordinary to assign a person to take care of infant's personal estate, 124.
- at certain age infants may dispose of personal estate by will, 113. 122.
- Inheritances never lineally ascend, 87.
- Interest, 57.
- Intestates, 1.
- Inventory, of making it, 37.
- things that are to be put therein, and the form of it, 41, 42.
- Joint-tenants, if husband and wife are joint-tenants, and husband sows the land and dies, wife shall have the corn, 31.
- Joint-tenancy, wife cannot be endowed of an estate held therein, 99.
- Jointure, wife may be barred of dower thereby, *ib.*
- Judgments docketted, 52, 53.
- not to be preferred in payment to a decree in equity, 54.

K.

- King, debts due to him, 52.
- intitled to the estates of intestates where there is no kindred, 84.
- Kindred distinguished either by the right line or collateral, 77.

L.

- Land given to or settled on a child, no advancement by the custom of London, 106, 107.
- Law not held so strict as formerly in respect to taking away things affixed, 32, 33.
- Leases for years chattels, and go to the administrator, 28, 29.
- Letters of attorney to two, by the death of one the authority ceaseth, 21.

M.

- Male issue admitted to inherit before female, 87.
- if two males in equal degree the eldest alone to inherit, 88.
- Mandamus, writ of, 3.

I N D E X.

Marriage with kindred doth not intitle to a share of an intestate's estate, 84.
 — husband and wife intitled in right of each other, 85.
 Mother intitled to her child's personal estate, 74, 75.
 Mortgage, to whom money due thereon is to be paid, 49.
 — to be paid out of the personal estate, 54.
 — not to be preferred in payment to other real incumbrances, 55.
 Non profs, executor shall pay cost on judgment thereof, 44.
 Notice of debts, 56. 58.

O.

Oath on taking letters of administration, 13.
 Ordinary, 2.
 — may be compelled to grant administration, 3.
 — his power of granting it, 3, 4, 5.
 Orphans of London, 102, 103.
 Outlawry, 48.

P.

Parson, if sow his glebe land, and die, his executors to have the corn, 31.
 Paraphernalia, wife's right thereto, 36, 37.
 Peculiar ecclesiastical jurisdictions, 8.
 Plantation, a chattel to pay debts, 46.
 Posthumous child intitled to a share in distribution, 75.
 Precedency in payment of debts may be given by administrator, 53, 54. 56.
 Prerogative court, reason of its foundation, 9.
 Prohibition, writ of, 18.

Q.

Queen consort, 67.

R.

Record, debts due thereon when to be paid, 52, 53, 54.
 — to be taken notice of at executors's peril, 56.
 Rent arrear equal to a debt by specialty, 55.
 — may be distrained for, 23.
 — administrators may bring actions or distrain for rent-service, rent-charge, rent-seck, and fee-farm, 23, 24.
 — description of these rents, 24, 25.

Rent

I N D E X.

- Rent that a man hath in right of his wife, the remedy he hath for getting the same after his wife's death, 25.
— that any person hath who has any rents of fee-farms for the life of another who dies, *ib.*
Release of a debt makes it assets, 48.
Representation, 71.
— how admitted among collaterals, 77.
Retainer, administrators may retain debts due to themselves, 27.
Revocation of administration, 18, 19, 20.

S.

- Scire facias* may be sued by new administrator, 44.
Seisin, difference between a seisin in law and seisin in deed, 94.
Simple contract debts, 57.
— one simple contract creditor may be paid his whole debt if no suit commenced, 58.
Specialty debts, when to be paid, 55.
— heir liable thereto, 93, 94.
Spiritual court, how the officers thereof shall act with respect to persons applying for administrations, 10, 11, 12.
— its power for compelling administrators to make distribution, 61.
Suspension of administration, 50.

T.

- Table of distribution, 83.
Tenants in fee-simple, fee-tail, and for term of life, 24.
Testament, distinction between that and a will, 1.

U.

- Use of a will where a man gives thereby just as much as the law would in case of intestacy, 122, 123.
— where a man leaves a wife and several children of age, 123.
— where a man leaves no wife but children under age, 124.

W.

- Wager of law, 55.
Widow's chamber by the custom of London, 103.
— what widows have been allowed by the custom of the province of York, 114.
Wife alone cannot dispose of her estate, 96.
Will, a man may thereby dispose of his whole personal estate, 101.
— method to preserve a will from being clandestinely destroyed, 125.

F I N I S.

